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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1939**

## No. 138

Z. M. McCARROLL, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS, APPELLANT,

*vs.*

DIXIE GREYHOUND LINES, INC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED JUNE 26, 1939.

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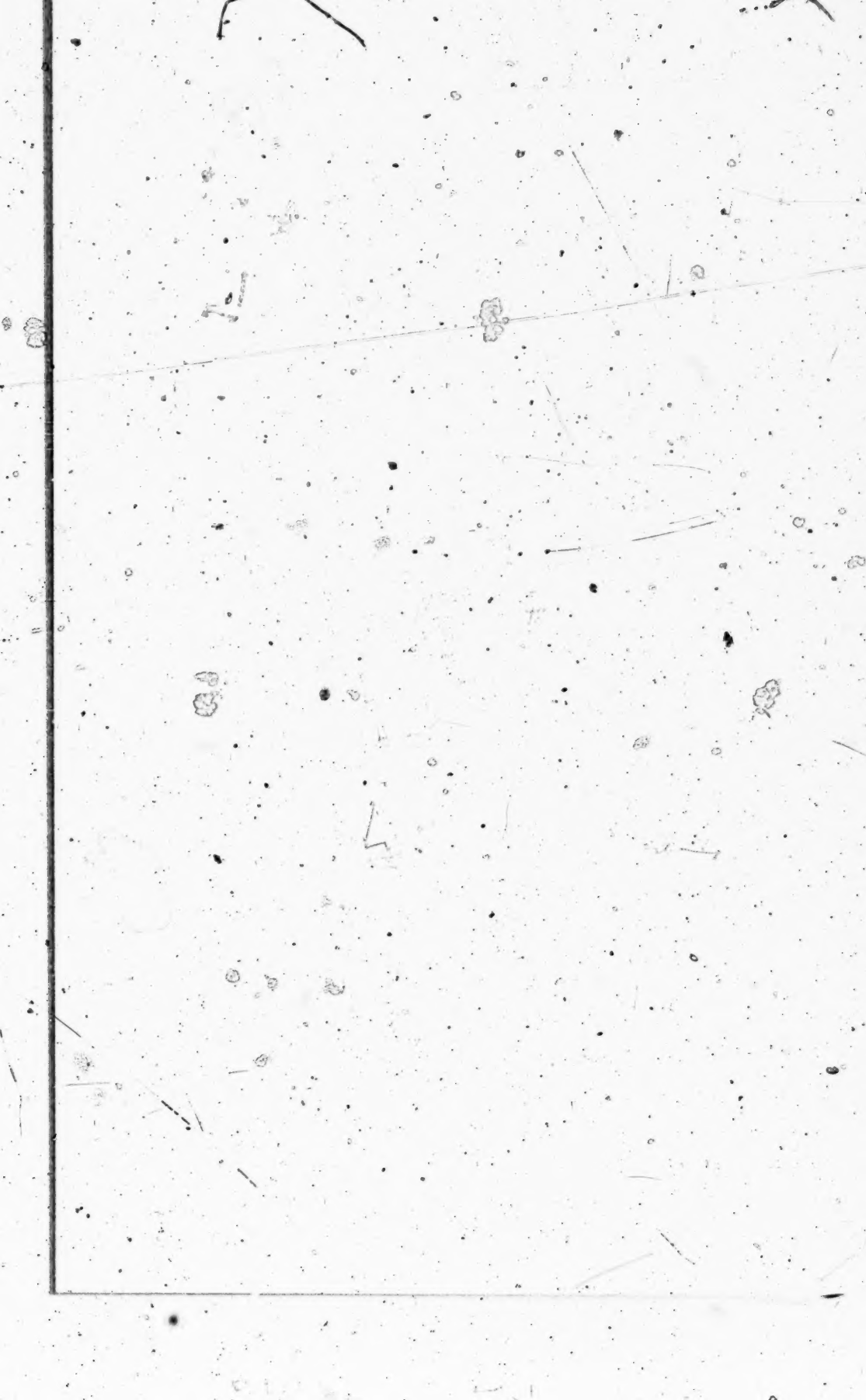


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**IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION**

No. 2655

DIXIE GREYHOUND LINES, INC.,

vs.

EARL R. WISEMAN, Commissioner of Revenues of the State of Arkansas

BILL OF COMPLAINT—Filed Oct. 31, 1934

To the Judge of the District Court of the United States for the Eastern District of Arkansas:

Dixie Greyhound Lines, Inc., a corporation duly created and existing under the laws of the State of Delaware, with its principal office at Memphis, in the State of Tennessee, brings this its bill against Earl R. Wiseman, as Commissioner of Revenues of the State of Arkansas, a resident and citizen of the State of Arkansas, and complains and says:

I

The ground upon which the jurisdiction of this Court depends is diversity of citizenship between the parties hereto; and the amount in controversy herein exceeds Three Thousand ($3,000.00) Dollars, exclusive of interest and costs. The plaintiff, Dixie Greyhound Lines, Inc., is a corporation duly created and existing under the laws of the State of Delaware, and is a citizen of the State of Delaware. The defendant, Earl R. Wiseman, is a resident and citizen [fol. 2] of the State of Arkansas. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

A further ground upon which the jurisdiction of this Court depends is that this suit is one of a civil nature in equity arising under the Constitution of the United States, to-wit, under Article 1, Section 8, Clause 3 thereof, commonly known as the "Commerce Clause," and under the

provision of the Fourteenth Amendment thereto, commonly known as the "Due Process Clause."

II

The plaintiff, Dixie Greyhound Lines, Inc., (whose corporate name was formerly "Central Greyhound Corporation") is a corporation organized for the purpose of operating as, and carrying on the business of a carrier of passengers by motor vehicle, and is engaged in the operation in various states of lines for the transportation of passengers through the agency of motor buses; and in aid of such purpose and business the plaintiff owns equipment of appropriate character, adequate to the giving of proper service, and also owns and holds numerous certificates of convenience and necessity issued or granted by the public service commissions of various states, authorizing plaintiff's said operations. Plaintiff is a public utility, and as such is subject to regulation and supervision [bb] the various public service commissions of the states in which it operates, in the same manner as other utilities, and is bound to furnish adequate service to the public over the routes upon which it regularly operates.

Pursuant to certificates of convenience and necessity granted it by the respective public service commissions of the states hereinafter mentioned, this plaintiff operates motor bus transportation for the carrying of passengers, baggage and light express, in both directions, over and upon the following interstate routes, among others:

(1) Between Memphis, Tennessee, and St. Louis, Missouri; traversing the streets and highways of the City of Memphis and State of Tennessee, a distance of 3 miles, that highway in the State of Arkansas known as "United States Highway No. 61" from the Tennessee-Arkansas State Line at Memphis, to the Arkansas-Missouri State Line, a further distance of 77 miles, and the aforesaid United States Highway No. 61 from the Arkansas-Missouri State Line through the State of Missouri to the City of St. Louis, Missouri, a further distance of 270 miles. Over all of this interstate route the plaintiff now operates three schedules daily in each direction.

[fol. 3] (2) Between Memphis, Tennessee, and Blytheville, Arkansas; traversing the streets and highways of the City

of Memphis and State of Tennessee, a distance of 3 miles, and that highway in the State of Arkansas known as "United States Highway No. 61" from the Tennessee-Arkansas State Line at Memphis to the City of Blytheville, Arkansas, a further distance of 77 Miles. Over this interstate route the plaintiff now operates one schedule daily in each direction.

(3) Between Memphis, Tennessee, and Jonesboro, Arkansas; traversing the streets and highways of the City of Memphis and State of Tennessee, a distance of 3 miles, that highway in the State of Arkansas known as "United States Highway No. 61" from the Tennessee-Arkansas State Line at Memphis to the town of Turrell, Arkansas, and that highway known as "United States Highway No. 63" from the town of Turrell, Arkansas, to the City of Jonesboro, Arkansas, a further distance of 72 miles. Over this interstate route the plaintiff now operates two schedules daily in both directions.

That upon each of the routes aforesaid, plaintiff is engaged in furnishing interstate transportation, and is engaged in interstate commerce in the transportation of passengers as aforesaid.

III

That the motor vehicles or buses, utilized by plaintiff in such interstate transportation of passengers, baggage and express are propelled by gasoline, and that the plaintiff is a very large user of gasoline in its transportation operations, purchasing and consuming in such operations almost one million gallons per year. The cost of such gasoline and the taxes paid thereon constitute one of the principal elements in the total cost of furnishing transportation to the public; and that the furnishing of such transportation by plaintiff in a proper, reliable and economical manner necessitates the maintenance by the plaintiff of storage facilities capable of [accom-odating] large quantities of gasoline. Such facilities must be large enough to permit the purchase and storage of gasoline in carload or bargeload quantities, because purchase of fuel in such quantities results in very material economy, and correspondingly lowers final transportation costs to the public; and it is further necessary that such facilities be not more numerous than absolutely necessary, because of the expense of installation and main-

tenance, and the cost — acquiring or leasing sites for the location of such storage, all of which expense are a part of the final transportation costs. It is essential that such storage [fol. 4] facilities should be located at strategic points, both with reference to the routes traversed by the plaintiff's buses (so that the latter may at all times be assured of fuel of proper type and quantity), and with reference to transportation facilities whereby the large quantities of fuel purchased may be conveniently and economically procured and handled. It is particularly necessary that, wherever circumstances permit, such storage facilities be set up at points where water transportation is available, for the reason that cost of transportation is a very large proportion of the final cost of gasoline, and water transportation of gasoline is cheaper than by rail.

That any variation from proper operating practices, as above set forth, and particularly any attempt to purchase gasoline casually at retail along the routes traversed by buses on regular schedule, without proper regard to type and quality of fuel and without regular and careful service in filling adequately sized tanks on the buses themselves, has the effect of not only greatly increasing the cost of motive fuel and thus ultimately the cost of transportation to the public, but also adversely affects and greatly impedes the regularity, reliability and convenience of such transportation; for the reason that such casual purchase of fuel at retail gives rise to inevitable delays, results in increased road failures of buses because of improper quality and insufficient quantity of gasoline, and deprives the transportation of the benefit of a regular, careful and systematic supervision of fuel quality and quantity. The result of such increased expense and lack of regularity of service is to increase the cost of the transportation, to affect the passengers with such increased cost and with the inconvenience, annoyance and loss due to incidental delays and trouble, and to cause the plaintiff itself great damage because of the loss of business and of good will resulting from such inferior service, and because of the risk of loss of its certificates of convenience and necessity for failure to operate upon same in a proper and convenient manner. That the casual filling of gasoline tanks of motor buses, along and upon the routes traversed, constitutes a risk to passengers therein, because of the inherent danger of handling gasoline and the hazard of fires caused by static electricity; and

for that reason the plaintiff is accustomed to fill the tanks of its buses only at times and places when the passengers have not entered the bus, or have temporarily left it. That the necessity for casual purchase of gasoline and the placing of same in the tanks of plaintiff's buses at road side stops, will subject passengers on such buses to the hazard of fire, as above stated. That unless the plaintiff is free to [fol. 5] purchase, store, and place in its buses for use, gasoline in such quantities and at such times and places as proper motor bus operation dictates, the effect will be definitely to increase the cost and hazard, and decrease the convenience, speed and quality, of the interstate transportation furnished by the plaintiff upon the routes operated by it, specifically including the particular routes above mentioned.

That with particular reference to its operations upon the routes aforesaid, [involving] in part operations into and within the State of Arkansas, Dixie Greyhound Lines, Inc., maintains gasoline storage facilities at Memphis, Tennessee, and at Caruthersville and St. Louis, Missouri. That each and all of said cities offer water transportation, and are properly located with respect to the routes traversed by the buses of the plaintiff. That no point within the State of Arkansas, on any of the routes traversed in that State by the plaintiff, offers any of the said advantages; and that the creation of storage facilities at any point on any of those routes within the State of Arkansas would constitute merely an expensive and useless duplication of existing and adequate facilities.

That, in its operations over the interstate routes hereinbefore mentioned, Dixie Greyhound Lines, Inc., is accustomed to use bus equipment of a type and size adequate to the convenience of the public offering [itself] for transportation upon those routes. The motor buses operated on the two interstate routes between Memphis, Tennessee, and Blytheville, and Jonesboro, Arkansas, are regularly equipped with gasoline tanks or containers having an aggregate capacity of fifty (50) gallons. These motor buses average about seven miles to each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to fill the tanks of these buses at Memphis, Tennessee, with a quantity of gasoline amply sufficient to transport the bus and its passengers from Memphis to Blytheville, or Jonesboro, Arkansas, and back again to Memphis, with proper reserve capacity against unforeseen contingencies. Those motor buses operated by

Dixie Greyhound Lines, Inc., upon its said route between Memphis, Tennessee, and St. Louis, Missouri, are of a larger type, and are equipped with tanks having a capacity of ninety (90) gallons or more. Such buses average about five miles for each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to fill the tanks of such Memphis-St. Louis buses, when northbound, at Memphis, and when such bus reaches Caruthersville, Missouri, the tanks are there replenished for the run to St. Louis. The southbound St. Louis-Memphis buses are filled at St. Louis, [fol. 6] and are also replenished at Caruthersville, Missouri, for the remaining run to Memphis.

That Dixie Greyhound Lines, Inc., pays to the State of Tennessee a tax of seven ($.07) cents per gallon and an inspection fee of four ($.004) mills per gallon on all gasoline placed by it in storage in its facilities at Memphis, Tennessee, whether such gasoline is used within the State of Tennessee or not; and Dixie Greyhound Lines, Inc., also pays to the State of Missouri a tax of three ($.03) cents per gallon on all gasoline placed by it in storage in its facilities at Caruthersville and St. Louis, Missouri or not; and the plaintiff avers and charges that every gallon of gasoline customarily brought into the State of Arkansas in the buses of Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, the States of Tennessee or Missouri.

That the distance from Memphis, Tennessee, to Blytheville, Arkansas, is eighty (80) miles; that the distance from Memphis, Tennessee, to Jonesboro, Arkansas, is seventy-five (75) miles; and that the distance from Memphis, Tennessee, to Caruthersville, Missouri, is one hundred five (105) miles.

## IV

That on the 2nd day of March, 1933, there was passed by the General Assembly of the State of Arkansas an Act, being Act 67 of the General Assembly of 1933, and entitled "A bill for an Act to be entitled: 'An Act to better enforce the Gasoline Tax and for other purposes,' " which said Act is in terms as follows:

"Be it enacted by the General Assembly of the State of Arkansas: Be it enacted by the People of the State of Arkansas:

Section 1: On and after the passage of this Act it shall be a violation of the law for any person, copartnership, or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tanks of said trucks to be used as motor fuel in said truck or motor vehicle until the State Tax thereon has been paid.

Section 2: Any person, co-partnership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100.00) dollars. Each load carried into the State shall constitute a separate offense.

Section 3: All laws and parts of laws in conflict herewith are hereby repealed. It is ascertained that this Act is neces- [fol. 7] sary to better enforce the gasoline collection laws and said Act being necessary for the [immediate] preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage."

That on the 26th day of January, 1934, there was passed by the General Assembly of the State of Arkansas an Act, being Act 11 of the Special Session of the General Assembly of 1934, and entitled, "A Bill for an Act to be entitled: 'An Act to refund Highway and Toll Bridge Obligations; to provide for the Payment and/or Funding of Certificates issued in aid of Municipal Improvement Districts; to provide for the Funding and/or Payment of Claims against the State Highway Commission, and for other Purposes,' " of which said Act those portions material to this cause are as follows:

"Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

'(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State.' "

"Section 25. Section 2 of Act No. 63 of the General Assembly approved February 25, 1931, is amended to read as follows:

'Section 2. The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this State; double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable.

The tax herein levied is to be collected at the source in this State of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this State, then when first brought into this State for use herein. Provided that notwithstanding any provision or provisions contained in this Act to the Contrary, no person, firm or corporation who manufacturers motor vehicle fuel in this State from crude oil and its deriviti-es shall be required to pay or collect the tax imposed by this Act on any such motor vehicle fuel that said person, firm or corporation sells and ships to the purchaser in a railway tank car. This pro-[fol. 8] vision, however, shall not relieve any person, firm or corporation from making reports to the Commissioner of Revenues showing the amount of motor vehicle fuel sold in railway tank cars, and the tax upon such motor vehicle fuel so shipped in railway tank cars shall be collected and paid by the person, firm or corporation which purchases the motor vehicle fuel which is shipped in a railway tank car.' ''

''Section 27. Nothing in this Act or in any similar law on the subject shall be construed as intending to levy any tax on motor vehicle fuel that the State has no power to tax.''

''Section 28. The tax of six and one-half cents per gallon herein provided for is levied and shall be collected, under such rules as may be promulgated by the Commissioner [or] Revenues for ascertaining the quantity of such motor vehicle fuel, on all motor vehicle fuel purchased in other states and used in this State in propelling motor vehicles on the public highways moving in interstate or foreign commerce in all instances where such tax is not a burden on such interstate or foreign commerce and such tax may be lawfully collected by this State.''

That pursuant to the Acts of the State of Arkansas, aforesaid, the defendant, Earl R. Wiseman, in his capacity as Commissioner of Revenues of the State of Arkansas, on the 12th day of February 1934, promulgated certain Regula-

tions known as Motor Vehicle Fuel Regulation No. 2, containing among other provisions the following:

"The following Rules and Regulations are hereby prescribed under the provisions of Act 65 and 146 of the Acts of 1929, Act 63 of the Acts of 1931 and Act 11—1934 of the Special Session in January 1934.

Motor Vehicle Fuel Tax Imposed

A privilege or excise tax of six and one-half (6½) cents per gallon is imposed on each gallon of Motor Vehicle Fuel received, sold or used in this State or purchased for sale or use in this State. Act 11, 1934."

* * * * * * *

"Motor Vehicle Fuel in excess of 20 gallons brought into this State in the fuel tank of a motor vehicle or in auxiliary tanks or containers is unlawful and any person, firm or corporation violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined [fol. 9] in any sum not exceeding one hundred ($100.00) dollars. Each load brought into the State shall [constitute] a separate offense. Act 67 of 1933."

* * * * * * *

"The tax of six and one-half (6½) cents per gallon herein provided for, shall be collected, under such rules as may be promulgated by the Commissioner of Revenues for ascertaining the quantity of such motor vehicle fuel, on all motor vehicle fuel purchased in other vehicles on the public highways moving interstate or foreign commerce in all instances where such tax is not a burden on such interstate or foreign commerce and such tax may be lawfully collected by this State."

That the defendant, Earl R. Wiseman, is the duly appointed and acting Commissioner [or] Revenues of the State of Arkansas, and as such is charged with the enforcement of these Acts of the State of Arkansas and Regulations aforesaid.

V

That the plaintiff has been informed by the defendant, and believes, and therefore avers and charges, that the

defendant Earl R. Wiseman, as Commissioner of Revenues, pursuant to what he conceives to be the duty cast upon him by such Acts and Regulations aforesaid, will proceed to bring about the arrest of the plaintiff, or its agents, in the event that, and so often as, such plaintiff shall enter the State of Arkansas with any one or more of its motor buses, on their regular interstate journeys, having then in the tanks of such buses gasoline in quantity exceeding twenty (20) gallons; and that said defendant will attempt to impose upon the plaintiff in each case the various penalties in said Acts provided, unless the plaintiff shall first pay to the State of Arkansas the regular Arkansas tax of 6½ cents per gallon upon the privilege of the use of such gasoline in interstate commerce.

VI

That it is not possible for this plaintiff to operate its motor buses, upon their regular interstate routes and trips into and within the State of Arkansas, by the use of that limited quantity of twenty gallons of gasoline which may without interference or molestation be brought into the State of Arkansas under the said Acts and Regulations, without incurring grave risk that such buses will run out of fuel while upon such routes, to the great delay and inconvenience of interstate passengers, and great incidental loss to the plaintiff.

[fol. 10]

VII

That if the defendant shall attempt to enforce against the plaintiff the Acts and Regulations above mentioned, this plaintiff will thereby be placed in the position of being compelled (1) to obey the unlawful restrictions of those Acts and Regulations, limiting the contents of its fuel tanks to twenty gallons, and thereby subject its interstate passengers to the inconvenience of road failures and stoppages and the delays and loss incidental thereto, or (2) to augment the said twenty gallons by the purchase of additional gasoline at retail when and as needed, at casual points within the States of Tennessee, Missouri, or Arkansas, at increased cost due to the additional tax in the case of purchases in Arkansas, and in every case with incidental delay and hazard, or (3) to set up at great expense unneeded and otherwise useless facilities for storage of gasoline in Arkan-

sas, or (4) to pay to the gasoline tax collecting authorities of the State of Arkansas an excise or privilege tax of 6½ cents on every gallon of gasoline, in excess of twenty gallons, brought into that State by plaintiff in the tanks of its buses for immediate consumption in its interstate transportation of passengers.

VIII

That plaintiff is advised and believes, and therefore charges, that the said excise or privilege tax of 6½ cents per gallon, purported to be imposed upon gasoline used in propelling vehicles in interstate commerce, under Section 28 of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, is not in truth and fact applicable to or collectible from the plaintiff, and that the attempted collection of such tax from this plaintiff would be oppressive and wrongful; for the reason that such excise or privilege tax, if collected from plaintiff as threatened, upon gasoline already validly taxed by other States and carried into the State of Arkansas in the tanks of buses then actually operating in interstate transportation, would constitute a burden upon interstate transportation and commerce by directly and materially increasing the cost and restricting the freedom, convenience and safety thereof. Plaintiff avers that the said Act 11 specifically disclaims any intention or purpose to have application, in any case wherein such application would give rise to any burden upon interstate commerce; and further avers and charges that if said Act 11 does have application to this plaintiff, in the course of those interstate operations aforesaid, the said act 11 is contrary to and violative of Article 1, Section 8, Clause 3, of the Constitu-
[fol. 11] tion of the United States, commonly known as the "Commerce Clause," and that provision of the Fourteenth Amendment to such constitution commonly known as the "Due Process Clause," and is consequently wholly void; and that any regulations pursuant thereto are also void.

That plaintiff is further advised and believes, and therefore charges that the said Act 67 of the General Assembly of Arkansas of 1933, insofar as it purports to prohibit and impose a penalty upon the bringing into the State of Arkansas of gasoline in excess of twenty gallons, contained in the tanks of vehicles presently engaged in interstate transportation, is contrary to and violative of Article 1, Section 8, Clause 3 of the Constitution of the United States,

commonly known as the "Commerce Clause," and of that provision of the Fourteenth Amendment to said Constitution commonly known as the "Due Process Clause," and is to that extent wholly void; for the reason that such limitation upon the fuel to be so carried is a burden upon such interstate commerce by reason of the additional expense, inconvenience and hazard directly placed thereon.

IX

That the wrongful attempts of the defendant to enforce such Acts against this plaintiff will occasion the plaintiff irreparable injury, and will involve the plaintiff in a multiplicity of suits; in that, if the plaintiff shall attempt to operate within the said twenty gallon limit, it will be unable properly and conveniently to operate its lines and to make connections with other carriers, and will suffer damage to its business, great in amount but incapable of exact determination; whereas, should it fail to comply with such limitation, it will be subjected to constant arrests and will be fined, and will be forced to litigate a large number of such criminal causes, and in addition will suffer damages to its business by reason of such arrests.

X

That the plaintiff is without adequate remedy at law in the premises, and only in a suit of this nature, and by the injunctive processes of this Court can it be fully protected in the enjoyment of its property and rights; and that the granting of the injunctive process as hereinafter prayed for will prevent the multiplicity of suits and prosecutions, and all questions here involved can be adequately determined.

In Consideration Whereof, The Plaintiff Prays:

1. That, upon the hearing, this Court declare that Act 67 of the General Assembly of Arkansas of 1933 is contrary to [fol. 12] and violative of Article 1, Section 8, Clause 3, and of the Fourteenth Amendment, of the Constitution of the United States and is void insofar as such Act 67 purports to prohibit the bringing into the State of Arkansas, in fuel tanks of vehicles then operating in interstate transportation, of gasoline in excess of twenty gallons; and that the Court further declare that Act 11 of the Special Session of the General Assembly of Arkansas of 1934, insofar as it

purports to impose or require the payment of an excise or privilege tax at the rate of 6½ cents per gallon upon all gasoline in excess of twenty gallons brought into the State of Arkansas in the fuel tanks of plaintiff's motor vehicles then operating in interstate transportation, is inapplicable to this plaintiff, and the said tax is not properly or legally collectible under such Act from such plaintiff, in the course of business of interstate transportation as carried on by the plaintiff; and further, that if and insofar as the said Act 11 does or shall purport to levy or impose such a tax upon gasoline in excess of twenty gallons thus brought into the State of Arkansas in the fuel tanks of motor vehicles of the plaintiff then engaged in operating in interstate transportation, the said Act 11 is in conflict with Article 1, Section 8, Clause 3, and of the Fourteenth Amendment, of the Constitution of the United States, and is void.

2. That, upon the hearing, the defendant, Earl R. Wiseman, as Commissioner of Revenues of the State of Arkansas, be permanently enjoined from in any way or manner enforcing or attempting to enforce against this plaintiff any provision of said Act 67 of the General Assembly of Arkansas of 1933, or any regulation pursuant thereto; and that said defendant, Earl R. Wiseman, as Commissioner of Revenues of the State of Arkansas, be further permanently enjoined against in any way or manner enforcing or attempting to enforce against this plaintiff any provision or provisions of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, which may purport to levy or require payment by this plaintiff of a license or excise tax at the rate of 6½ cents a gallon or otherwise upon any gasoline, in excess of twenty gallons, brought into the State of Arkansas in motor vehicles of the plaintiff then operating in interstate transportation.

3. That the plaintiff have such other, further and general relief to which it may be entitled in the premises.

Dated this 25th day of April, 1934.

Chandler, Shepherd, Owen & Heiskell, Solicitors for Plaintiff.

[fol. 13] *Duly sworn to by Frederick Smith. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO ORIGINAL BILL OF COMPLAINT—Filed Jan. 2, 1935

Comes Plaintiff, Dixie Greyhound Lines, Inc., and leave of court being first had and obtained, amends the original bill of complaint filed by it herein, in the following respects:

1. By striking out that paragraph beginning near the bottom of page 5 of such original complaint with the words "That in its operation over the interstate routes hereinbefore mentioned" and concluding on page 6 of such original complaint, and substituting in lieu thereof the following paragraph:

"That, in its operation over the interstate routes hereinbefore mentioned, Dixie Greyhound Lines, Inc., is accustomed to use bus equipment of a size and type adequate to the convenience of the public, offering itself for transportation upon those routes. The motor buses operated upon those interstate routes between Memphis, Tennessee, and Jonesboro and Blytheville, Arkansas, and Caruthersville, Missouri, will travel an average of approximately seven miles for each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to place in the tanks of its Memphis to Jonesboro and Memphis to Blytheville buses a sufficient quantity of gasoline to transport the bus to its destination and return; and is accustomed to place in the tank of its Memphis to Caruthersville bus a sufficient quantity of gasoline to transport the bus to Caruthersville, where a supply can be added from storage at that point sufficient to return the bus to Memphis. Those buses operated upon the interstate route between Memphis, Tennessee, and St. Louis, Missouri, will average approximately five miles for each gallon of gasoline consumed. Dixie Greyhound Lines, Inc., is accustomed to place in the tanks of its buses, northbound from Memphis to St. Louis, a quantity of gasoline sufficient to transport the bus to Caruthersville, Missouri, where the tanks can be supplied from the run to St. Louis. The tanks of the southbound St. Louis to Memphis buses are supplied at St. Louis with fuel in amount sufficient to transport such buses to Caruthersville, Missouri, where an

[fol. 15] amount of gasoline may be added sufficient to transport the bus to Memphis."

2. By correcting the following omission and error with respect to schedules operated by plaintiff, and distance between points, in the original complaint:

(a) In addition to those schedules from Memphis to St. Louis operated on United States Highway No. 61, the plaintiff also operates one schedule daily in each direction on said Highway between Memphis, Tennessee and Caruthersville, Missouri.

(b) The distance between the Tennessee-Arkansas State Line and Blytheville, Arkansas, is 71.4 miles, and not 77 miles.

Dixie Greyhound Lines, Inc., By Chandler, Shepherd, Owen & Heiskell, Solicitors.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS AND ANSWER OF DEFENDANT—Filed July 12, 1935

MOTION TO DISMISS

Comes now Earl R. Wiseman, Commissioner of Revenues of the State of Arkansas, the defendant in the above entitled action, and files this motion, and hereby moves the court to dismiss the above entitled action, and to dismiss the plaintiff's bill of complaint on file in said action upon the following grounds:

I

That the facts set forth in said bill of complaint are not sufficient to constitute a cause of action against this defendant.

II

That the plaintiff has a full, complete, and adequate remedy at law to recover the relief herein sought.

ANSWER

Without waiving any rights inuring to defendant under, and by virtue of, the foregoing motion to dismiss, but re-

serving all of the said rights thereunder, defendant for his answer herein states:

I

Defendant admits that the plaintiff is a corporation duly created and existing under the laws of the State of Delaware [fol. 16] with its principal office at Memphis in the State of Tennessee, and admits that he is a resident and citizen of the State of Arkansas.

II

Admits that a diversity of citizenship exists between the parties hereto; that the amount in controversy herein exceeds $3,000.00 inclusive of interest and costs.

Admits that this a suit of a civil nature in equity arising under Article 1, Section 8, Clause 3, of the Constitution of the United States, commonly known as "The Commerce Clause" and under the provisions of the Fourteenth Amendment thereto, commonly known as "The Due Process Clause."

III

Admits that the plaintiff is a corporation organized for the purpose of operating as, and carrying on the business of, a carrier of passengers by motor vehicles, and is engaged in the operation, in various states, of lines for the transportation of passengers through the agency of motor buses, and that in aid of such purpose and business the plaintiff owns proper automotive equipment, and certificates of convenience and necessity issued by the various states through which it operates.

Admits that plaintiff operates its motor buses between Memphis, Tennessee and St. Louis, Missouri over United States Highway 61 through, upon, and over said highway within the State of Arkansas from the Tennessee-Arkansas state line to the Missouri state line.

Admits that plaintiff operates its motor buses interstate between Memphis, Tennessee and Blytheville, Arkansas over United States Highway 61 from the Tennessee-Arkansas state line at Memphis, to the City of Blytheville, Arkansas.

Admits that the plaintiff operates its automobile buses interstate between Memphis, Tennessee and Jonesboro, Arkansas over United States Highway 61 from the Tennessee-

Arkansas state line at Memphis to the town of Turrell, Arkansas; and thence over United States Highway 63 from the town of Turrell to the City of Jonesboro, Arkansas.

Admits that upon each of the routes aforesaid plaintiff is engaged in furnishing interstate transportation and is engaged in interstate commerce.

IV

Admits that the motor vehicles used by plaintiff in its interstate transportation of passengers are propelled by [fol. 17] gasoline, but not having sufficient information upon which to base a belief as to the amount of gasoline used by plaintiff, defendant denies that plaintiff consumes almost 1,000,000 gallons of gasoline in one year. Defendant states that it has not sufficient information upon which to base a relief as to the allegation with reference to the cost of gasoline and taxes paid thereon by the plaintiff or whether it is necessary for plaintiff to maintain large storage facilities, and therefore denies same. Defendant denies that it is necessary for plaintiff to purchase gasoline in carload or in barge load lots, and denies that such purchases result in material economy and lower transportation cost to the public; denies that such purchases will save expense in the installation and maintenance of storage tanks and leasing sites for location of such storage; denies that it is necessary that such storage be located only at points where water transportation is available; denies that water transportation of gasoline is cheaper than by rail, and denies that the storage of gasoline by plaintiff is necessary to assure it at all times of fuel of proper type and quantity.

Denies that the purchase of gasoline at retail along the routes traversed by its buses will have the effect of increasing the cost of such gasoline, and increase the cost of transportation to the public; denies that such purchases will impede the regularity the reliability, and [conv--ience] of its transportation service, and that such purchases of gasoline, at retail, would give rise to inevitable delays, road failures, and prevent a regular, careful, and systematic supervision of the fuel so purchased; denies that such purchases would increase the cost of transportation and subject its passengers to inconvenience, annoyance, delays, and trouble, and denies that it would cause the plaintiff any damage or loss of business or the risk of losing any of its certificates of convenience and necessity.

Denies that such purchase of gasoline at retail, along the route of its buses, would constitute a risk to passengers thereon because of the inherent danger caused by static electricity or otherwise, and denies that it will subject its passengers to a fire hazard; denies that such purchase will increase the cost of transportation service and decrease the convenience, speed, and quality of the transportation service now operated by the plaintiff over the routes above mentioned.

Denies that no point within the State of Arkansas is unable to furnish plaintiff any storage facilities such as [fol. 18] that used by plaintiff at Memphis, Tennessee, and Caruthersville and St. Louis, Missouri, and denies that the creation of storage facilities at any point on its route within the State of Arkansas would constitute an expensive and useless duplicate of existing facilities.

Defendant admits that in its operation over the interstate routes hereinbefore mentioned, the plaintiff, Dixie Greyhound Lines, Incorporated, is accustomed to use bus equipment of a size and type adequate to the convenience of the public offering itself for transportation upon its routes. Defendant states that he does not have sufficient information upon which to base a belief, and, therefore, denies that the motor buses operated upon the routes between Memphis, Tennessee and Jonesboro and Blytheville, Arkansas, and Caruthersville, Missouri, will travel an average of approximately seven miles for each gallon of gasoline consumed. Defendant further states that he has not sufficient information upon which to base a belief, and therefor- denies that the plaintiff is accustomed to place in the tanks of its Memphis to Jonesboro and Memphis to Blytheville buses a sufficient quantity of gasoline to transport the buses to those [to those] destinations and return. And denies that it is accustomed to place in the tank of its Memphis to Caruthersville bus a sufficient quantity of gasoline to transport the bus to Caruthersville, where a supply can be added sufficient to return the bus to Memphis. Defendant further states that he has not sufficient information upon which to base a belief, and therefore denies that those buses operated between Memphis, Tennessee and St. Louis, Missouri will average five miles for each gallon of gasoline consumed; and denies that the plaintiff is accustomed to place in the tanks of its buses, north bound from Memphis to St. Louis, a quantity of gasoline sufficient to transport the bus from

Caruthersville, Missouri, where the tanks can be supplied for the run to St. Louis, and denies that the tanks of the south bound St. Louis to Memphis buses are supplied at Caruthersville, Missouri, with a sufficient amount of gasoline to transport the bus to Memphis.

V

Defendant further states that the buses operated by the plaintiff between Memphis, Tennessee, and Blytheville and Jonesboro, Arkansas, are equipped with tanks having a capacity of fifty (50) gallons, and that such tanks are filled to capacity each time said bus begins its run, and defendant states that the amount of unused gasoline in said tank exceeds the amount of twenty (20) gallons and is capable [fol. 19] of being used as a motor fuel, and that the Arkansas State Tax has not been paid thereon, and that under the provisions of the statutes herein involved is subject to tax by the State of Arkansas.

Defendant further states that the buses operated by the plaintiff between Memphis, Tennessee, and St. Louis, Missouri are equipped with tanks having a capacity of ninety (90) gallons, and that such tanks are filled to capacity each time said bus begins its run, and defendant states that the amount of unused gasoline in said tank exceeds the amount of twenty (20) gallons and is capable of being used as a motor fuel, and that the Arkansas State tax has not been paid thereon, and that under the provisions of the statutes herein involved is subject to tax by the State of Arkansas.

VI

Defendant denies that plaintiff pays to the State of Tennessee a tax of seven cents per gallon and an inspection fee of four mills per gallon on all gasoline placed by it in its storage tanks in Memphis, Tennessee; and denies that it pays to the State of Missouri a tax of three cents per gallon on all gasoline placed by it in storage at Caruthersville and St. Louis, Missouri; and denies that every gallon of gasoline brought into the State of Arkansas by the plaintiff in its buses has been taxed by, and the tax paid to, the state of Tennessee or Missouri.

Admits that the distance from the Tennessee-Arkansas state line to Blytheville, Arkansas is 71.4 miles and the distance from Memphis, Tennessee, to Jonesboro, Arkansas is

seventy-five (75) miles and the distance from Memphis, Tennessee, to Caruthersville, Missouri is one hundred and five (105) miles.

VII.

Admits that on the 2nd day of March, 1933, the General Assembly of the States of Arkansas enacted Act 67, entitled "An Act to Better Enforce the Gasoline Tax and for Other Purposes", and that said Act is correctly copied at length in the complaint of plaintiff on page seven thereof.

Defendant states that on February 12, 1934, the General Assembly of the State of Arkansas enacted Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, entitled "An Act to Refund Highway and Toll Bridge Obligations of the State and Road Improvement District Obligations; to Provide for the Payment and/or Funding of Certificates Issued in Aid of Mu- [fol. 20] nicipal Improvement Districts; to Provide for the Funding and/or payment of Claims Against the State Highway Commission and for Other Purposes" and admits that plaintiff has [correctly] copies Sections 22, 25, 27, and 28 of said Act as shown on page eight of its complaint.

Defendant admits that, in his capacity of Commis*mis*-sioner of Revenues of the State of Arkansas he promulgated certain regulations known as, "Motor Vehicle Fuel Regulation No. 2" and that the provisions of said regulations have been correctly copied as part of the complaint in this cause on page nine of the complaint.

Defendant admits that he is the duly appointed and acting Commissioner of Revenues of the State of Arkansas and as such is charged with the enforcement of the Acts and regulations above set forth.

VIII

Defendant admits that pursuant to the provisions of Act 67 of 1933 and Act 11 of the Special Session of 1934 he will proceed to bring about the arrest of plaintiff, and his agents, so often as they, and each of them, enter the State of Arkansas in buses having, in their tanks, gasoline in a quantity exceeding twenty gallons upon which no tax has been paid the State of Arkansas, and that he will attempt to impose upon plaintiff, and his agents, all the various penalties provided by said Acts; and unless and until plaintiff shall pay the tax upon said gasoline due the State of Arkansas by virtue of the provisions of the above mentioned Acts.

IX

Defendant denies that it is impossible for plaintiff to operate its motor buses upon their regular interstate and intrastate routes and trips into and within the State of Arkansas with twenty gallons of gasoline; but on the contrary states that such quantity is ample to operate its buses into, through, and out of the State of Arkansas, and that the enforcement of the provisions of the Acts herein attacked and the compliance therewith by the plaintiff will in no manner interfere with its business as an interstate carrier, and defendant states that if plaintiff elects to bring into the State, in the tanks of its buses, more gasoline than twenty gallons, it thereby becomes amenable to the provisions of the Acts in question, and as such is liable to the State of Arkansas for the tax and penalties prescribed by the statutes.

X

Defendant denies that the Act and regulations restricting the contents of the vehicle tanks of plaintiff's buses to [fol. 21] twenty gallons is an unlawful restriction, and that it will subject its interstate passengers to inconvenience, loss, and delay. Denies that if plaintiff augments the said permitted twenty gallons by the purchase of additional gasoline, within the State of Arkansas, it will result in a delay or create a hazard; and denies that the provisions of the Acts in question will necessitate the purchase of storage facilities in the State of Arkansas; and admits that plaintiff will be required to pay the State of Arkansas a privilege tax of six and one half (6½) cents per gallon on every gallon of gasoline in excess of twenty gallons brought into the State of Arkansas in the tanks of its motor vehicles.

XI

Defendants denies that the gasoline tax imposed by Act 67 of 1933, as amended, is not applicable to, or collectible from, the plaintiff; and denies that the attempted collection of such tax from plaintiff is oppressive and wrongful; denies that the collection of such tax from plaintiff would constitute a burden upon interstate transportation and commerce; denies that such tax would directly and materially increase the cost and restrict the freedom, convenience, and safety of such commerce.

Defendant specifically denies that the tax imposed by the statutes herein under attack are contrary to, and violat-e of, Article 1, Section 8, Clause 3, of the Constitution of the United States, commonly known as "the Commerce Clause" and that provision of the Fourteenth Amendment to the Constitution of the United States commonly known as "the due Process Clause"; and denies that said statutes are void; denies that the imposition of the tax levied by the statutes constitutes a burden upon interstate commerce by reason of additional expense, inconvenience, hazard or otherwise.

XII

Defendant denies that his attempts to enforce the Acts in question against the plaintiff are wrongful, and denies that his actions will occasion the plaintiff irreparable injury; denies that it will involve the plaintiff in a multiplicity of suits; denies that if said statutes in question be enforced against the plaintiff it will be unable to properly and [conveniently] operate its lines or that it will suffer damage to its business in any amount whatsoever.

XIII

Further answering, and by way of cross-complaint, this defendant states that Act 67 of 1933 was approved and be- [fols. 22-24] came effective on March 2, 1933. That said Act makes it unlawful for any person to drive, or cause to be driven, into the State of Arkansas an automobile or truck carrying over twenty gallons of gasoline in the tank of such vehicle to be used as motor fuel in said truck or vehicle until the State tax has been paid thereon.

Further answering, defendant states that Act 67 of 1933, and the pertinent provisions of Act 11 of 1934, set forth in the complaint of the plaintiff herein and herein attacked, are, in all respects, constitutional and valid, and do not in any manner whatsoever violate the provisions of "the Commerce Clause" or "the Due Process Clause" of the Constitution of the United States, but on the contrary are proper enactments for the protection, use, and benefit of the State of Arkansas, and the plaintiff is, in all respects, amenable to their provisions and liable for the tax therein imposed.

Further answering, defendant specifically denies that the statutes herein under attack are unconstitutional, and denies

that the plaintiff is entitled to injunctive relief, or any other relief, to prevent enforcement against them.

Wherefore, defendant asks that plaintiff take nothing by its complaint herein, and that same be dismissed; that upon a final hearing of this cause defendant have judgment against the plaintiff for all its costs herein expended and all other proper and equitable relief.

Louis Tarlowski, Solicitor for Defendant.

[File endorsement omitted.]

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[fol. 25] In United States District Court

Order Substituting Z. M. McCarroll, Commissioner of Revenues, Etc., as Defendant in the Place of Earl Wiseman—Filed Jan. 6, 1938

It Is Ordered that Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, be and hereby is substituted as defendant herein in place of Earl R. Wiseman, without prejudice to the proceedings already had in this cause, and that this cause may be continued and maintained [fols. 26-35] against said Z. M. McCarroll as successor in office of said Earl R. Wiseman.

This 6th day of January, 1938.

Thomas C. Trimble, Jr., District Judge.

[File endorsement omitted.]

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In United States District Court

[Title omitted]

Stipulation Relating to Application for Preliminary Injunction, Etc.—Filed Jan. 6, 1938

It is hereby stipulated by counsel for the respective parties in the above styled cause, as follows:

1. That the application for preliminary injunction, pursuant to the amendment to the original bill in the cause, is not being pressed by the plaintiff at this hearing, but that

said hearing is to be had with reference to permanent injunction only.

2. That the affidavits of E. W. Smith and Frederick Smith may be offered by either party in evidence in the trial of this cause, and that such affidavits shall be received in evidence in the same manner as though the affiants had testified personally in the cause to the matters in such affidavits set forth.

Chandler, Shepherd, Owen & Heiskell, Attorneys for Plaintiff, Louis Tarlowski, Attorney for Defendant.

[File endorsement omitted.]

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[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 31, 1938

[fol. 37] The Court makes the following findings of fact herein:

I

That it has jurisdiction of the parties herein and of the subject matter of this action.

II

That Plaintiff is a Delaware Corporation, doing business within the State of Arkansas as an intrastate and interstate common carrier of passengers, baggage, and light express; and Defendant, Z. M. McCarroll, is the duly appointed, qualified and acting Commissioner of Revenues of the State of Arkansas, and is the proper official of said State to collect the gasoline tax herein involved.

III

That Plaintiff herein, Dixie Greyhound Lines, Inc., is a common carrier of passengers by motor vehicle, operates a bus line from Memphis, Tennessee to Jonesboro, Arkansas over U. S. Highways 70, 61 and 63, and that the distance upon this route, within the State of Arkansas, is 70 miles.

IV

That the Plaintiff herein, Dixie Greyhound Lines, Inc., as a common carrier of passengers by motor vehicle, operates a bus line from Memphis, Tennessee to Saint Louis, Missouri over U. S. Highways 70 and 61, and that upon this route 77.9 miles are located within the State of Arkansas.

V

That Plaintiff herein, Dixie Greyhound Lines, Inc., as a common carrier of passengers by motor vehicle, operates a bus line from Memphis, Tennessee to Blytheville, Arkansas, over and upon U. S. Highways 70 and 61, and of which route 71.4 miles are located within the State of Arkansas.

VI

That the busses, operated by Plaintiff over and upon the above described routes, are propelled by gasoline motors, and average approximately five miles for each gallon of gasoline consumed; and that twenty gallons of gasoline will be sufficient for each of its busses, upon the above described routes, to traverse the State of Arkansas and its operations therein.

VII

That each of the busses of the Plaintiff operating into, through, and across the State of Arkansas carry within its [fol. 38] tanks a supply of gasoline in excess of twenty gallons, and that the Arkansas State Tax has not been, and is not being, paid thereon.

VIII

That, under Act 67 of the General Assembly of the State of Arkansas for the year 1933, it is declared unlawful to drive, or cause to be driven, an automobile in the State of Arkansas carrying more than twenty gallons of gasoline in its tanks, unless the State Tax thereon has been paid.

IX

That, under Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, a tax of 6½¢ per gallon is levied upon all gasoline sold or used in the State of Arkansas, and

such tax is required to be collected by the manufacturer or wholesaler on sales made within the State of Arkansas, and when not sold within the State of Arkansas, then the tax shall be collected when the fuel is first brought into the State.

X

That, under Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27 and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, there is levied a tax of 6½¢ per gallon upon all gasoline, in excess of twenty gallons, brought into the State of Arkansas, in the tanks of the busses operated by the Plaintiff.

XI

That, the highest Court of last resort of the State of Arkansas has construed the statutes hereinabove set forth, and the tax levied thereunder, to be a privilege tax for the use of the highways, and that the Legislature has declared the public policy of the State to be to tax all gasoline sold or used in this State, for such purposes, in order to prevent fraud and imposition on the State, in the sale or use of a comparatively negligible quantity for other purposes.

XII

That all of the revenues, derived and collected by the State of Arkansas from the above cited statutes, become a part of the highway revenues of the State of Arkansas, and are devoted, allocated, and used for the purpose of building, maintaining and improving the highways of the State of Arkansas, and for the payment of principal and interest [fol. 39] upon outstanding highway obligations; and that no part of said revenues goes into, or becomes a part of, the General Revenue Fund of the State of Arkansas.

XIII

That the tax imposed under the statutes herein involved, and the payment thereof by the Plaintiff, will not work an undue hardship upon it, nor materially increase its expenses of operation, and does not unduly burden or confiscate the business of the Plaintiff.

XIV

That the Plaintiff is amenable and subject to the provisions of Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, and should pay tax at the rate of 6½¢ per gallon upon all gasoline, in excess of twenty gallons, brought into the State of Arkansas, in the tanks of its busses.

XV

That the Plaintiff can operate its busses within the State of Arkansas, over the routes heretofore set forth, upon twenty gallons of gasoline, and that, therefore, no extra burden or increased cost is placed upon it by the statutes hereinunder attacked.

XVI

That, under its schedules of operation, ample time is afforded the Plaintiff to refill its fuel tanks at its Arkansas termini, prior to beginning a return trip, and before passengers are permitted to enter, and without danger or inconvenience to its passengers and the traveling public.

XVII

That it is physically possible for Plaintiff to build and maintain, within the State of Arkansas, gasoline storage facilities ample for its requirements and needs.

XVIII

The Court further finds that the demand made upon the Plaintiff by the Defendant herein, requiring it to pay the tax in question, is a valid demand.

[fol. 40] Conclusions of Law

The Court finds as its conclusions of law from the foregoing facts:

I

That the relief sought by the Plaintiff should be denied, and its application for an injunction against the Defendant should be dismissed.

II

That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27 and 28 of the Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, in so far as the same applies to and affects the Plaintiff, is constitutional and valid, and is not violative of Act 1, Section 8, Clause 3 of the Constitution of the United States.

III

That the demand of the Defendant upon the Plaintiff for the payment of the tax in question is a valid demand, and Plaintiff is liable for the payment thereof.

IV

That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, in so far as the same applies to and affects the Plaintiff, is constitutional and valid, and is not violative of Amendment 14, commonly known as the due process clause of the Constitution of the United States.

V

That an appropriate decree embodying the findings and conclusions herein expressed may be entered.

Thomas C. Trimble, Jr., Judge.

[File endorsement omitted.]

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[fol. 41] In United States District Court for the Western Division of the Eastern District of Arkansas

No. 2655

Dixie Greyhound Lines, Inc., Plaintiff,

vs.

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, et al., Defendant

Opinion—Filed March 31, 1938

This suit, brought by Dixie Greyhound Lines, Inc., involves an attack upon the validity of Act 67 of the General

Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly for the year 1934. The Defendant is the duly appointed, qualified, and acting Commissioner of Revenues of the State of Arkansas, and, under the foregoing statutes, is duly authorized to collect and enforce payment of the tax involved in this controversy.

Act 67 of 1933 provides that it shall be unlawful for any person to drive, or cause to be driven over the highways of the State of Arkansas, any automobile carrying more than twenty gallons of gasoline in its tank, unless the State Tax shall have first been paid thereon. The applicable sections of Act 11 of 1934, commonly known as the Refunding Act, levy a tax of 6½¢ per gallon on all gasoline sold or used in the State of Arkansas, and provide the method and manner by which said tax shall be collected and paid.

Plaintiff is a common carrier engaged in transportation of persons, baggage, and light express, and in the conduct of its business, operates a bus line from Memphis, Tennessee to Blytheville, Arkansas, Jonesboro, Arkansas, and to the Arkansas-Missouri line, over Highway 61, en route to Saint Louis, Missouri. The record reflects that each of these operations may be conducted by Plaintiff with less than twenty gallons of gasoline, but Plaintiff contends such operation is neither practical nor safe.

The Court of last resort of the State of Arkansas, in its case of Sparling vs. Refunding Board, 189 Ark. 189, has construed the gasoline taxing provisions of Act 11 of 1934, and has concluded that such tax is a privilege tax for the use of the highways, and has found that the Legislature of the State has declared the public policy of the State to be to tax all gasoline sold or used in the State for such purpose, in order to prevent fraud and imposition on the State in the sale or use of a comparatively negligible quantity for other [fol. 42] purposes. This interpretation of the statute is binding upon this Court. See Morehead vs. New York, 298 U. S. 585, 80 L. Ed. 1347.

The record further shows that all funds, collected by the State of Arkansas from the sale or use of gasoline, are used for the purpose of building, maintaining, and repairing its system of State Highways, and for the additional purpose of meeting and paying maturities and interest upon highway obligations heretofore issued, and that none of the funds

thus collected go into, or become a part of, the General Revenue Fund of the State. See Act 11 of 1934.

It has now become a generally recognized principle of law that a state may lawfully tax interstate carriers using its highways for private gain; not for the privilege of engaging in interstate commerce, but as compensation to the State for the use of its highways, and more especially where the proceeds of such tax are, as in the instant case, used for the purpose of constructing and maintaining a highway system. See Sprout vs. South Bend, 277 U. S. 169, 72 L. Ed. 836; Kane vs. New Jersey, 242 U. S. 160, 61 L. Ed. 222; Clark vs Poor, 274 U. S. 554, 71 L. Ed. 1199; Interstate Buses Corporation vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551; Hendrick vs. Maryland, 235 U. S. 610, 59 L. Ed. 385.

The Plaintiff herein contends not that the tax, thus levied by the State of Arkansas upon the sale and use of gasoline, is confiscatory, but that to pay the tax would increase its costs of doing business, and thereby lessen its profit of operation, and that to purchase gasoline within the State of Arkansas is not practical nor safe to the traveling public. This contention is untenable. When the power to tax exists, the extent of the burden is a matter for the discretion of the law makers. Even if a tax should destroy a business, it would not be made invalid or require a compensation upon that ground alone. Those who enter upon a business take that risk. See Fox vs. Standard Oil Company of New Jersey, 294 U. S. 87, 79 L. Ed. 780; Magnano Company vs. Hamilton, 292 U. S. 40, 78 L. Ed. 1109.

The Supreme Court of the United States, in the recent case of Bingaman vs. Golden Eagle Western Lines, 297 U. S. 626, 80 L. Ed. 928, had occasion to pass upon a question not unlike that herein involved. That case involved an attack upon a statute of the State of New Mexico, levying an excise tax of 5¢ per gallon upon the sale and use of gasoline and motor fuel oil. The Bus Company involved operated a line of busses in interstate commerce, over the highways of the [fol. 43] State of New Mexico, with gasoline purchased in another state. It refused to pay the New Mexico tax, and brought a suit to restrain the enforcement of the statute, contending that it violated the commerce clause of the Federal Constitution.

The Supreme Court, in passing upon this contention, used the following language:

"The case turns upon the question of whether the pertinent statutory provisions exact a charge as compensation to the State for the use of its highways, or impose an excise tax for the use of an instrumentality of interstate commerce. If the former, the tax should be sustained; if the latter, it clearly contravenes the commerce clause, and must be held bad."

Applying the foregoing test to the statutes involved in the case at bar, the conclusion is reached that the statutes under attack are constitutional and valid, and constitute a valid and proper exercise of the taxing authority of the State of Arkansas. See also Clyde Mallory Lines vs. State of Alabama, 296 U. S. 261, 80 L. Ed. 215; Morf vs. Bingaman, 298 U. S. 406, 80 L. Ed. 1245; Bowman vs. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139.

Plaintiff insists that the case of Helson vs. Kentucky, 279 U. S. 245, 73 L. Ed. 683, is decisive of the issues involved in this case. A careful reading and analysis of that case discloses a striking dissimilarity between the situation obtaining in that case and in the case at bar. In that case, the State of Kentucky endeavored to collect a tax upon the gasoline used by a ferry boat operating on a river. The question of state owned facilities or state owned highways was not in any manner involved. The question of the use of public property by an interstate carrier for private gain was not an issue in the case. In the instant case, state owned facilities, consisting of many miles of improved highways, built and maintained at an enormous expense, and used by a common carrier for private gain is directly involved. The proceeds of the tax involved are used directly and specifically for the purpose of keeping, in a state of repair, those highways which Plaintiff uses in the daily conduct of its business. It is a rule of law, now firmly entrenched, that interstate commerce must pay its own way, and must pay for those facilities furnished it by the various states, provided such charges are reasonable and bear a fair degree of relationship to the facilities afforded; and no complaint is made in this instant case that the charges made by the State of Arkansas are neither reasonable nor fair.

[fol. 44] Plaintiff further relies upon the fact that the gasoline used in the operation of its busses, over the highways of the State of Arkansas, has been previously taxed by the State of Tennessee. Unfortunately, this fact does not in any manner preclude the State of Arkansas from

likewise exacting a tax for the use of its highways. If Plaintiff chooses to purchase its gasoline within the State of Tennessee, rather than to purchase same within the State of Arkansas, this is a matter with which the Courts are not concerned. It is a matter of business policy and business expediency which addresses itself solely to those in charge of the affairs of the Plaintiff. Such a course of conduct can neither bind, nor prevent, the State of Arkansas from collecting, and from enforcing collection, of obligations legally due it, and such fact affords Plaintiff no defense against the payment of the tax herein involved.

Since Plaintiff has elected to bring into the State of Arkansas more gallons of gasoline than is permitted to be brought tax exempt, by the laws of the State of Arkansas, and since, under the interpretation of the statutes in controversy by the Court of last resort of the State of Arkansas, such excess amount of gasoline is taxable, and the proceeds from such tax are devoted entirely to the expense of maintaining a highway system in this State, it is the opinion of the Court that the Acts under attack are constitutional and valid; and that the prayer for an injunction to enjoin the Defendant from collecting such tax should be denied.

The relief prayed will be denied; the statutes in controversy will be held constitutional and valid, and appropriate findings of fact, conclusions of law, and decree, in accordance with this opinion, may be prepared.

Thomas C. Trimble, Jr., Judge, U. S. District Court
Eastern District of Arkansas.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFF, DIXIE GREYHOUND LINES, INC., FOR REHEARING AND FOR ORAL ARGUMENT—Filed April 2, 1938

To the Honorable Thomas C. Trimble, Judge of the District Court for the Eastern District of Arkansas:

The petitioner, Dixie Greyhound Lines, Inc., plaintiff in the above entitled cause, shows to the Court:

1. That heretofore this Court, of its own motion, ordered that this cause be submitted on briefs of counsel, without oral argument.

[fol. 45] 2. That on March 31, 1938, this Court filed herein its findings of fact and conclusions of law, and its opinion in the cause, concluding that the tax complained of by the plaintiff was valid and collectible from the plaintiff, and that the plaintiff was not entitled to the relief sought. No decree has yet been entered in the cause.

3. The Court, in its opinion, concludes that the plaintiff is liable for tax on all gasoline in excess of twenty gallons brought into the State of Arkansas in the tanks of its buses then engaged in interstate journeys, and without regard to whether the gasoline in such tanks is or is not to be used in propelling the vehicle upon the highways of Arkansas or upon the highways of Missouri or Tennessee.

In so finding, the Court has completely ignored (and in its findings and opinion does not even refer to or mention) that proposition of law, urged by the plaintiff and embodied in the decision of the Supreme Court of the United States in Interstate Transit, Inc. vs. Lindsey, 283 U. S. 183, to the effect that while a state may under certain restricted conditions impose a tax upon an interstate carrier for the use of the highways, such a charge is a direct burden upon interstate commerce and the state may demand only fair compensation for the use; and further, and especially, that "being valid only if compensatory, *the charge must necessarily be predicated upon the use made, or to be made, of the highways of the State*" (page 190); and that, where no sufficient relation exists between the measure of the charge and the degree of use, the imposition cannot stand.

Even if every portion of the Court's findings and opinion were sound (which is not conceded, as hereafter appears), the above mentioned principle is decisive of the cause in favor of the plaintiff. The tax demanded is not on the excess over 20 gallons used on the roads of Arkansas; it is on every gallon, in excess of 20 gallons, which may happen to be in the tank at the time of entering Arkansas, regardless of the time or place of use. As clearly pointed out in the brief on behalf of the plaintiff, a vehicle may enter the state one day, let us say bound from Memphis to Blytheville, with ninety gallons in its tank, and it is taxed on seventy

gallons; whereas, the next day the same vehicle may cover the same route but, because it brought in only thirty gallons, it is taxed on ten gallons. The amount of this tax, which must be related to the degree of the use if it is to be [fol. 46] valid at all, is wildly, grotesquely fortuitous. It is as absurd as though the tax for the "use of the road" were decreed to be "all the money which the operator happens to have in his pocket on entering the state". The tax does not even deign to inquire how much actual use the vehicle is to make of the roads; the state does not care whether that use is small or great. The only question the operator is asked is, "How much gas is there in your tank?" If there is much you pay much; if there is little, you pay little (or nothing); yet your destination may be the same in each case, or the man with little may be going further than the man with the full tank.

This principle of law, which Judge Martineau found so obviously applicable as to justify a decision from the bench, following oral argument, was advanced in the brief of plaintiff, and was not even mentioned or attempted to be answered by the defendant, and has not been mentioned by this Court in its findings or opinion. It is submitted that the principle established by the case of Interstate Transit, Inc. vs. Lindsey, supra, is decisive of this cause in favor of the plaintiff, and that the opinion and findings of the Court should at this time be amended so as to grant the relief prayed for.

4. That those findings of fact, filed by the Court herein, are inaccurate or erroneous in the following respects, among others:

(a) In Finding No. IX, the Court finds as a fact that when gasoline is not sold in the state "then the tax shall be collected when the fuel is *first brought into* the state?" whereas, in point of fact the applicable language of Section 25 of the Act in question is "when first brought into this state *for use therein*." Yet the opinion of the Court holds such gasoline in excess of 20 gallons to be taxable when brought into the state, regardless of whether same is to be used therein.

(b) Finding No. XI is not a finding of fact at all, but is a conclusion of law. Treated as a conclusion of law, it is unsound; because the actual decision of the Arkansas Supreme Court, while effecting to characterize the tax as a

privilege tax for the "*use of the highways*", actually construes it as applicable to all non-highway uses, which is a complete contradiction in terms. Both conclusions cannot be true. Yet this Court is, in effect, accepting both as true, unmindful of the principle announced by the United States [fol. 47] Supreme Court that while the state Court's construction of a state statute must be accepted, the Federal Courts are not bound by characterization placed upon the tax by the state Court, but will draw and give effect to their own conclusions with respect to the actual character and effect of such tax.

St. Louis S. W. R. Co. vs. Arkansas, 235 U. S. 350;
St. Louis Cotton Compress Co. vs. Arkansas, 260 U. S. 346.

This Court, insofar as its findings and opinion indicate, has made no attempt to apply this test, although the construction and characterization of the tax by the state Court constitute in themselves a contradiction in terms and cannot stand together.

(c) Finding No. XII is erroneous, in that it states that gasoline tax revenue becomes part of the highway revenue and is devoted to and used for the purpose of building and improving the highways of the state, and for paying the interest and principal of outstanding highway obligations, and that no part of the revenue goes into the general fund. As there is no record evidence as to any phase of the above questions, it is inferred that the Court must have been taking judicial notice of Arkansas statutes. However, it is submitted that the obligations of the State of Arkansas, for highway construction past or future, are the general obligations of the state, and its responsibility therefore is not limited to gasoline tax revenue. As the New Mexico Court says in the case of Breece vs. Mirabel, 287 Pac. 692, at 701, where a similar proposition was advanced to support the tax, this is merely a financial arrangement by the state to make certain the prompt payment of its obligations, and is immaterial in determining the character of the tax.

(d) Finding No. XIII is not supported by the record; and, if true, is immaterial and forms no basis for the legal conclusion which the Court bases upon it. It is in evidence and undisputed that the imposition of this tax will very materially increase the costs of the plaintiff, either in

the increased cost of gasoline or in the construction of unneeded facilities, and would impair the service. Specifically, it is in evidence that gasoline was selling at five cents a gallon, plus freight at 2.8 cents. This cost of 7.8 cents, plus the Tennessee tax of 7.4 cents (which plaintiff must pay on all gasoline coming to rest in Tennessee) aggregate 15.2 cents. The Arkansas tax of 6½ cents would therefore increase the plaintiff's fuel cost about 43%.

[fol. 48] Furthermore, in a case such as this, involving a burden on interstate commerce, it is not a prerequisite to invalidity that the tax should be unduly burdensome or confiscatory. In implying, that such a tax directly imposed upon the interstate carrier in the very act of its interstate journey, must be found unduly [burden*home*] or confiscatory before it can be found invalid, the Court has departed from the very fundamentals of this type of question.

This burden is laid directly upon the exercise of the privilege of interstate commerce; the interstate carrier in the course of his interstate journey is told that he must pay a tax or his progress will be stopped and he will be fined and jailed. Yet—

"Any state statutes *which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause.*"

Furst vs. Brewster, 282 U. S. 493, at 498.

Illustrative of this fundamental rule are:

Ozark Pipe Line vs. Manier, 266 U. S. 555, 562.
Leloup vs. Mobile, 127 U. S. 640, 648.
Lyng vs. Michigan, 135 U. S. 161, 166.

Under the fundamental principle of these cases, no burden, however light, may be directly laid upon interstate commerce. This rule is reaffirmed in Helson vs. Kentucky, 279 U. S. 245; and it is subject to no exception, other than that of the impost upon interstate carriers for use of the roads, and as already set forth, that impost cannot be valid unless reasonably related to the use to be made of those roads.

(f) Finding No. XIV is not a conclusion of fact, but is a conclusion of law, being in effect the entire legal question involved in the case. It therefore does not deserve to be treated as a question of fact, or given weight as such.

(g) Finding No. XV is not supported by the record. It is an undisputed mathematical fact that plaintiff cannot operate its buses from Memphis to Jonesboro or Blytheville and return on twenty gallons. And, if those buses can traverse the State of Arkansas between Memphis and the Missouri line on Highways 70 and 61, on twenty gallons of gasoline, such fact would be misleading in view of the additional fact that those buses could not reach Carruthersville [fol. 49] where storage is available. The buses make five miles to the gallon, and from Memphis to Corruthersville is 105 miles. Hence this finding is partially erroneous and wholly misleading.

(h) Finding No. XVI is erroneous in part, in that the record shows such time for filling tanks to be available only in Jonesboro or Blytheville in the case of local buses, and is not shown to be available elsewhere, particularly on the important St. Louis-Memphis through route.

(i) Finding No. XVII is true so far as it goes; but the Court omits the undisputed fact that such facilities for storage of gasoline in Arkansas would constitute an entirely useless expense, and to that extent burden the interstate transportation.

(j) Finding No. XVIII, purporting to be a finding of fact, is not such, but is a conclusion of law; and it is therefore not entitled to the status of a finding of fact.

5. Those Conclusions of Law filed by the Court in the cause are erroneous; insofar as they collectively reach the legal conclusion that the Acts of the State of Arkansas, therein mentioned, are valid as applied to this plaintiff and that the plaintiff is legally liable for a tax of 6½ cents per gallon of gasoline for each gallon in excess of twenty gallons brought into the State of Arkansas in the tanks of its interstate buses.

6. This cause having been directed by the Court, of its own motion, to be submitted on briefs, and the findings and opinion of the Court failing to reflect consideration of numerous propositions of law raised by the plaintiff, it is submitted that an oral argument of the cause is required, in order that plaintiff's counsel may more thoroughly present to the Court the propositions involved, and that such oral argument should now be had.

Wherefore, Petitioner Prays that this Court will grant a rehearing and oral argument of said cause on such terms as to the Court shall seem proper.

Dated this April 1, 1938.

Chandler, Shepherd, Owen & Heiskell, Barber & Henry, Attorneys for Plaintiff.

[fol. 50] *Duly sworn to by J. H. Shepherd, jurat omitted in printing.*

Endorsed: "Filed Apr. 2, 1938, Sid B. Redding, Clerk."

(Refiled in identical terms on April 22, 1938)

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IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed April 6, 1938

Comes the plaintiff, Dixie Greyhound Lines, Inc., and moves the Court to find the following facts in addition to the findings heretofore filed in this cause:

I

The tax in question is levied upon and the amount thereof fixed by the number of gallons of gasoline which happen to be in the fuel tanks of the motor vehicles at the time such vehicles cross a state line into Arkansas; and such tax has no relation to the number of miles of highways of the State of Arkansas over which the vehicle is to pass, or to the amount of use of such highways, or to the amount of wear and tear incident to such use of such highways, by such motor vehicle.

II

The tax in question is a tax upon gasoline bought in other states and brought into the state of Arkansas in the fuel tanks of the motor vehicles, and is levied upon, and the amount thereof is fixed by, the number of gallons of gasoline contained in said fuel tanks regardless of whether said gasoline is used in propelling such motor vehicles over the

highways of the state of Arkansas or is carried through the state of Arkansas into other states and used in propelling such motor vehicles over the highways of other states.

[fol. 51]

III

The Commissioner of Revenues of the State of Arkansas has demanded that the plaintiff pay to the State of Arkansas a gasoline tax of 6½¢ per gallon upon each gallon of gasoline, in excess of 20 gallons, brought into the State in the tanks of its [guses], without regard to whether such gasoline was used in propelling the bus within the State of Arkansas or was used in propelling the bus in other States, or was intended merely as a reserve to provide for contingencies or emergencies. Such demand by the defendant was made pursuant to a conception of duty as Commissioner of Revenues of the State of Arkansas, under the terms of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, and Act 67 of the General Assembly of Arkansas of 1933.

IV

In addition to the facts found by the Court in paragraph IV of his findings heretofore filed, the following:

Upon this route 261.8 miles are within the State of Missouri, and 3 miles are within the State of Tennessee.

V

In addition to the facts found by the Court in paragraph VI of his findings heretofore filed, the following:

But such buses cannot be operated from Memphis to Jonesboro and return upon 20 gallons of gasoline; or from Memphis to Blytheville and return on 20 gallons of gasoline. That while such buses can actually traverse the State of Arkansas on the route from Memphis to St. Louis without using an entire 20 gallons, such 20 gallons is insufficient to carry the bus the entire distance between Memphis and Carruthersville, at which point such facilities are available. In no single instance can the buses of the plaintiff run from Memphis to their termini and return, or from Memphis to the next gasoline storage facilities of the plaintiff, on 20 gallons of gasoline.

VI

That the facts found by the Court in paragraph IX of his findings heretofore filed, be amended so that the last provision thereof regarding gasoline not sold within the State be made to read:

"And when not sold within the State of Arkansas then the tax shall be collected when the fuel is first brought into the State 'for use herein' ".

(See Code Sec. 6872, Chapter 11, Acts of 1934 Sec. 25).

[fol. 52]

VII

That the facts found by the Court in paragraph XII of his find-s heretofore filed, be amended so as to designate the percentage of tax applied to different highway uses, as provided in the statutes, as follows:

"All net tax derived from motor vehicle fuel under the provisions of the statutes above cited, shall be divided: 92.3% shall be deemed State highway revenue, and 7.7% shall be deemed County highway improvement revenue," and shall be expended in accordance with the provisions of said legislative enactments as set out in the Code Sec. 6604.

VIII

In connection with findings 13, 15, 16, 17, the Court is asked to find the following:

Since the cost of motor fuel is one of the principal expenses in furnishing transportation, and since the plaintiff operates as a certificated public carrier, supervised by the State Commissions and the Interstate Commerce Commission, it is necessary to the efficient operation of the Company that it should exercise diligence in purchasing gasoline as cheaply as possible and in obtaining a uniform quality and proper grade of gasoline, for the effect of increasing the cost of the motor fuel is ultimately to increase the cost of transportation furnished.

It is impracticable from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey.

The filling of gasoline tanks in buses at roadside filling stations in a casual manner also constitutes a risk to the

passengers on such bus, a delay in the service, incidental road failures and an inconvenience to the passengers.

The plaintiff maintains major gasoline storage facilities at Memphis, Tennessee and at St. Louis, Missouri. Each of these cities offers water transportation and is strategically located with respect to the routes traveled by the plaintiff's buses, affording the plaintiff an opportunity to have cheaper gasoline available at convenient localities.

While it is physically possible for the Company to create and maintain gasoline storage facilities in the State of Arkansas, from an operating point of view it is uneconomi- [fol. 53] cal to set up such facilities at any point within such State on the lines of the plaintiff. There is no point within the State of Arkansas, on any of the routes traversed by the plaintiff within that State which offers advantages for the efficient purchase and storage of gasoline, or where the acquisition and maintenance of storage facilities would not be a useless expense and waste of money involving unnecessary duplication of facilities.

Comes the plaintiff, Dixie Greyhound Lines, Inc., and moves the Court to specify the following conclusions of law in addition to the conclusions heretofore filed in this cause:

I

There is no sufficient relation between the measure employed in fixing the amount of the tax here under consideration and the extent or manner of use by the plaintiff of the highways of the State of Arkansas to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses.

II

As a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, the charge levied must be necessarily predicated upon the use made or to be made, of the highways of the state, the number of miles traveled, or the degree of wear and tear incident to such use, and cannot be arbitrary or unrelated to the amount of such use.

The foregoing conclusions of law are based upon the recent case of Interstate Transit Company, Inc., vs. Lindsey, County Court Clerk, 283 U. S. 183, 51 Supreme Court, 380.

III

That the aforesaid Acts of the State of Arkansas, as interpreted by the defendants and sought to be applied against the plaintiff, are invalid as contrary to Article I, Section 8, Clause 3, being the so-called commerce clause, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. The tax in question purporting to be a license or privilege tax, cannot be sustained as a valid license or privilege tax for the use of the highways of the State of Arkansas.

[fol. 54] To the Findings of Fact and Conclusions of Law which are inconsistent with the foregoing requested Findings of Fact and Conclusions of Law, the plaintiff reserves its exceptions.

Respectfully submitted,
Barber & Henry, Chandler, Shepherd, Owens & Heiskell, Attorneys for Plaintiff, Dixie Greyhound Lines, Inc.

[File endorsement omitted.]

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In United States District Court, Eastern District of Arkansas, Western Division

No. 2655

Dixie Greyhound Lines, Inc.,

[—]

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, et al.

Decree—April 4, 1938

This cause came on to be heard at this term upon briefs of counsel; and on consideration hereof, it is ordered, adjudged and decreed as follows:

That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, insofar as said Act, under the tes-

timony and pleadings, applied to the plaintiff herein, is in all respects constitutional and valid.

That the State of Arkansas is entitled to collect in the manner provided by the statutes above named, a tax of 6½¢ per gallon on each gallon of gasoline, in excess of twenty (20) gallons, hereafter brought into the State of Arkansas in the tanks of plaintiffs' buses.

[fols. 55-59] That the relief sought by the plaintiff herein, and its application for an injunction, be and the same is hereby in all respects denied and its bill dismissed. That the costs of this action shall be paid by the plaintiff.

To the action of the Court in adjudging said statutes constitutional as applied to the plaintiff herein, and in dismissing its bill, plaintiff excepts and petitions the Court for rehearing, and for additional and different findings of fact.

Thomas C. Trimble, Jr., Judge.

Dated this April 4th, 1938.

Endorsed: "Filed Apr. 12, 1938. Sid B. Redding, Clerk."

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[fol. 60] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PETITION FOR REHEARING AND MOTION FOR ADDITIONAL FINDINGS OF FACT—Filed May 27, 1938

This cause came on to be heard this date upon the petition of Dixie Greyhound Lines, Inc. for a rehearing and for [fol. 61] oral argument and upon the motion for additional findings of fact and conclusions of law, heretofore filed by Dixie Greyhound Lines; and thereupon, after hearing argument upon said petition and motion, the Court is of the opinion that said petition for rehearing, and said motion for additional findings of fact and conclusions of law should be overruled, except as to the request of the Plaintiff to correct the Court's Finding of Fact No. IX, which is granted by removing the period after the word "State", appearing in the last line of said Finding, and adding thereto the words "for use herein".

It is accordingly ordered, adjudged and decreed that except, that as above set forth, the petition for rehearing

and motion for additional findings of fact and conclusions of law be and the same are hereby overruled.

To the action of the Court in so ordering, the Plaintiff excepted, and gave notice in open Court of its intention to appeal, which appeal is by the Court granted, upon the plaintiff's complying with the statutes in regard thereto, and filing an appeal bond, with acceptable surety, in the amount of $500.00 and, if the plaintiff should elect to supersede the judgment of the Court herein, it shall give supersedeas bond in such an amount and embodying such provisions as may be ordered by this Court.

Thomas C. Trimble, Judge, United States District Court, Eastern District of Arkansas, Western Division.

OK: Chandler, Shepherd, Owen & Heiskell, Attorneys for Plaintiff.

OK: Louis Tarlowski, Attorney for Defendant.

[File endorsement omitted.]

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[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

**Abstract of Testimony**—Filed July 1, 1938

STIPULATION

It was stipulated by counsel that the affidavits of E. W. Smith and Frederick Smith might be offered by either party, and should be received in evidence in the same manner as though affiants had testified personally in the cause to matters in such affidavits set forth.

The plaintiff, Dixie Greyhound Lines, Inc., produced the following testimony:

E. W. SMITH, testifying by affidavit pursuant to such stipulation of counsel, testified as follows:

He is a resident of Memphis, Shelby County, Tennessee, and is Vice-President, Assistant General Manager, and Member of the Board of Directors of Dixie Greyhound

Lines, Inc. In his capacity of Assistant General Manager, he is directly in charge of what is known as the Operating Department of Dixie Greyhound Lines, Inc., which Department has control and management of the actual running and operation of the motor buses employed in the business of Dixie Greyhound Lines, Inc., the servicing of said motor buses, and the control of the personnel employed in such operation. In his capacity as Vice-President and Director, the affiant is familiar with the general corporate business of Dixie Greyhound Lines, Inc., and with its methods of doing business wherever its operations are conducted, and with the certificates of convenience and necessity, and/or interstate operating rights held by that Company. The affiant is the officer of said Company most familiar with the particular details hereinafter referred to in this affidavit.

Dixie Greyhound Lines, Inc., is a corporation organized and existing under the laws of the State of Delaware, but having its principal office in the City of Memphis, Tennessee, and qualified to do business in the States of Tennessee, Arkansas, Missouri, and elsewhere. The business of said corporation is the transfer of passengers by motor vehicle, and the lines operated by Dixie Greyhound Lines, Inc. or [fol. 63] by its wholly owned subsidiary, Dixie Greyhound Lines, Inc. of Illinois, traverse or enter the States of Tennessee, Alabama, Arkansas, Mississippi, Missouri, Kentucky, Illinois, and Indiana. The Company is a subsidiary of the Greyhound Corporation, and is an affiliate of what is known as the Greyhound System. As such, its operations are to a very considerable degree integrated with those of other Companies having a similar affiliation, with the purpose of maintaining a transportation system in which each Company is supposed to do its part in the furnishing and maintenance of prompt and efficient service, to the motor vehicle traveling public.

Dixie Greyhound Lines, Inc., (sometimes in this testimony referred to as the "Company" or "Dixie") is a common carrier; and as such it is under the control and regulation of the Public Utility regulatory bodies of the various States in which it does an intrastate business, and under the control of the Interstate Commerce Commission with respect to its interstate business wherever carried on. As a matter of fact, the various Commissions above mentioned

exercise over the Company that control usually exercised over a public utility.

The Company owns and holds, in various states, numerous certificates of convenience and necessity and operating rights issued or granted to it by the Public Service Commissions of such States, authorizing its operation within those States. Pursuant to certificates of convenience and necessity granted to it by the Public Service Commissions of the States of Tennessee, Arkansas and Missouri, the Company operates motor bus transportation for the carrying of passengers, baggage and light express, in both directions, over and upon the following interstate routes, among others:

(1) Between Memphis, Tennessee and St. Louis, Missouri; traversing the streets and highways of the City of Memphis and State of Tennessee, on United States Highway No. 70 to the Tennessee-Arkansas line, and thence through Arkansas on Highway U. S. 70 to West Memphis; from this point, the route follows United States Highway No. 61 through Turrell, Osceola, Blytheville, and the other towns located upon that road, to the Arkansas-Missouri line; thence the route follows U. S. 61 through Missouri (diverting for several miles to enter the City of Caruthersville, Missouri), to St. Louis. According to the mileage log compiled and used by the Company, the distance between Memphis and St. Louis is 342.7 miles, measured along the route as the buses actually traverse it. Of this mileage, [fol. 64] three miles are in Tennessee, 77.9 miles are in Arkansas, and the remaining 261.8 miles are in Missouri.

(2) Between Memphis, Tennessee and Blytheville, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Blytheville. Of this route, three miles are in Tennessee and 71.4 miles are in Arkansas.

(3) Between Memphis, Tennessee and Jonesboro, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Turrell, and via U. S. 63 to Jonesboro, through the towns located upon those highways. The distance between Mem-

phis and Jonesboro is 73 miles, of which three miles lie in Tennessee and the remaining 70 miles in Arkansas.

On each of the above mentioned routes, the Company is engaged in furnishing interstate transportation of passengers. Upon the same routes, the buses of the Company also furnish intrastate transportation; but the interstate business is by far the more important. Passengers offering themselves for transportation, whether in interstate or intrastate transportation, are transported in the same buses, and a normal bus trip will contain passengers of interstate and intrastate character. Interstate passengers very greatly predominate in numbers and percentage of ticket sales.

The motor buses used by the Company in the transportation of its interstate passengers, baggage and express, are propelled by gasoline motors. The Company is a very large user of gasoline in its transportation operations, having purchased and consumed in such operations 1,259,401 gallons during the year 1935. The cost of such gasoline at the refinery and the transportation charges and taxes paid thereon, constitute one of the principal elements in the total cost of furnishing transportation. It has been found, through years of experience, that the only economical, safe, practicable and reliable method of obtaining and handling gasoline requires the maintenance by the operating company of storage facilities capable of [accommodating] gasoline in [in] large quantities. Such facilities must be large enough to permit the purchase and storage of gasoline in carload or bargeload quantities; because gasoline may be purchased in such quantities direct from the producers at much lower cost than would be paid by the public for small [fol. 65] quantities, and this economy in purchasing is sufficiently great to materially lower the final transportation cost to the public. It is necessary that such storage facilities be not more numerous than absolutely necessary, because of the expense of installation and maintenance of facilities, and the cost of acquiring or leasing sites for the location of such storage, all of which expenses become a part of the final transportation cost. It is necessary that such storage facilities should be located at strategic points, with reference to the routes traversed by the motor buses; and where such strategic locations also have water trans-

portation available, the saving in transportation charges is very much increased, not only by reason of the fact that water transportation is cheaper in itself, but also because the availability of water competition tends to reduce the competitive railroad rates. It is, therefore, particularly necessary that, wherever circumstances permit, storage facilities should be set up where water transportation is available. It is further necessary that the Company should exercise supervision over the quality and grade of the gasoline used by it, and should see that such gasoline is not only of the proper grade, but also uniform; because, variations of grade and type which would make little difference in the cost of operation of a single pleasure car, would cause an important increase in cost in the course of a year, and in the case of a public carrier of the type of Dixie Greyhound Lines, Inc., which operates in excess of six million miles per year. It is quite impracticable, from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey.

Variation from proper operating practices, as above set forth, has the effect of increasing the cost of motor fuel, and thus ultimately increasing the cost of transportation furnished to and paid for by the public and such variations also adversely affect and impede the regularity, safety, reliability and convenience of such transportation. The casual purchase of fuel along the roadside at retail creates delays, while the carrying in the tanks of the buses of insufficient quantity of gasoline is likely to result in an increased number of road failures of the buses because of improper quality and insufficient quantity of gasoline. Either of the above alternatives tends to increase the cost of the transportation, to affect the passengers with such increased cost, and with the inconvenience, annoyance and loss due to incidental roadside delays and trouble, and loss of connections at destinations. Such irregularity and lack of convenience in [fol. 66] transportation would cause to Dixie Greyhound Lines, Inc., itself great damage because of loss of business and good will resulting from inferior service; and further subjects the Company to risk of loss of its certificates of convenience and necessity and operating rights by reason of failure to operate upon the same in a proper and convenient manner. The filling of gasoline tanks and buses at roadside filling stations, in a casual manner, constitutes a

risk to the passengers on such bus, because of the inherent danger of handling gasoline and the hazard of fire caused by static electricity. Because of such danger, the Company makes it a rule to fill the tanks of its buses only at times and places when the passengers have not entered the bus, or have temporarily left it, the Company in promulgating such rule having in mind the panic which might result should a loaded bus catch fire, and the fact that there has been at least one such static fire within its own experience, to an unloaded bus.

With particular reference to its operations between Memphis and St. Louis, and Memphis and Jonesboro, Arkansas, which routes involve all of its operations within the State of Arkansas, the Company maintains major gasoline storage facilities at Memphis, Tennessee, and at St. Louis, Missouri. Each of these Cities offers water transportation, and is properly located with respect to the routes traveled by the Company's buses. In April, 1934, the Company also operated storage facilities at Caruthersville, Missouri, which is also a River point, but these facilities were found to be uneconomical, and are not being used at this time. If it were found necessary to resume their use, it would have the effect of increasing the operating cost, and consequently the cost of transportation. There is no point within the State of Arkansas, on any of the routes traversed by the Company within that State, which offers advantages for the purchase and storage of gasoline, or where the acquisition or maintenance of storage facilities would not prove to be a useless expense to the Company.

In operation over the interstate routes above mentioned, the Company is accustomed to use bus equipment of a type and size sufficient to the convenience of the public, as indicated by the patronage offered. In April, 1934, the buses operated upon the interstate route between Memphis and Jonesboro were of a type and size which would then travel an average of seven and one-half miles for each gallon of gasoline consumed. However, at the present time, the equipment being used upon that particular route is of somewhat larger size; and at this time, all of the buses of the Com- [fol. 67] pany operated between Memphis and Jonesboro and between Memphis and St. Louis will average approximately five miles for each gallon consumed. The Company is accustomed to put into the tanks of its Memphis to Jones-

Loro buses, and into its Memphis to Blytheville and its Memphis to Caruthersville local buses, an amount of gasoline sufficient to transport the bus to its destination and return, with a reasonable margin of safety. In April, 1934, the Company was accustomed to send out its Memphis to St. Louis buses with a quantity of gasoline in the tank sufficient to carry the bus to Caruthersville, where the supply was renewed for the remaining journey to St. Louis; and the St. Louis to Memphis buses were filled at St. Louis. At the present time, however, tanks are filled in Memphis and St. Louis.

As of the date of this testimony (October, 1936) gasoline is currently selling at the refineries for five cents per gallon. To this cost should be added freight to the point of storage, which, in the case of Memphis, is 2.18 cents a gallon. The Company pays to the State of Tennessee a tax of seven cents per gallon and an additional inspection fee of four mills per gallon on all gasoline placed by it in storage in its facility at Memphis, Tennessee, whether such gasoline is used within the State of Tennessee or not, the fact of storage in that State making such gasoline liable for the tax. The Company also pays to the State of Missouri a tax of three cents per gallon on all gasoline placed by it in storage in its facilities in that State, whether such gasoline is used in the State of Missouri or not. Every gallon of gasoline which is carried into the State of Arkansas in the tanks of a motor bus owned by Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, either the States of Tennessee or Missouri.

Caruthersville, Missouri, the first River point north of Memphis on the Memphis-St. Louis route, is 105.2 miles distant from Memphis, according to the mileage log of the Company. This mileage log, which has been referred to, is made up from actual mileage readings taken over the routes which the buses actually follow, which routes involve the distance covered in traveling through Cities and off the main highways to towns and Cities served by the buses but not located upon the main route.

Affiant knows it to be a fact that motor cars designed for [pleasure] use generally have a gasoline tank capacity of less than twenty gallons; while commercial equipment of more than the smallest size, is habitually equipped with gasoline tanks holding in excess of twenty gallons, the actual

[fol. 68] tankage varying with the type of equipment and the use for which it is designed.

At this time, the Company is operating two scheduled trips daily in each direction between Memphis and Jonesboro, Arkansas; three scheduled trips daily in each direction between Memphis and St. Louis; two scheduled trips daily in each direction between Memphis and Blytheville, and one scheduled trip daily in each direction between Memphis and Caruthersville, Missouri.

In no single instance can the buses of the Company run from Memphis to their termini and return, or from Memphis to the nearest gasoline storage facilities of the Company on twenty gallons of gasoline.

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FREDERICK SMITH, testifying by affidavit pursuant to such stipulation of counsel, testified as follows:

He is a resident of Memphis, Shelby County, Tennessee, and is President, General Manager, and Member of the Board of Directors of Dixie Greyhound Lines, Inc. In his capacity as such President, General Manager and Director, he is in general supervision of all of the business of such corporation, and is acquainted with its methods of operation and the reasons therefor.

The affidavit of E. W. Smith, Vice-President of Dixie Greyhound Lines, Inc., [Inc.], correctly sets forth the facts and matters therein referred to, according to the information, belief and experience of this witness.

As now operated, those motor buses operated by Dixie Greyhound Lines, Inc., from Memphis into and through the State of Arkansas, are accustomed to reach and enter the State of Arkansas, whether from Memphis or from St. Louis, with an amount of gasoline in the tanks of such buses exceeding twenty gallons in amount. It is necessary, from the operating point of view, that more than twenty gallons of gasoline be in such tanks upon such buses reaching the State of Arkansas, for the reason that such buses cannot operate from Memphis to Jonesboro and return upon twenty gallons of gasoline, and, while such buses can actually traverse the State of Arkansas, on the line between Memphis and St. Louis, without expending the entire twenty gallons, such twenty gallons are insufficient to take the bus between Memphis and Caruthersville, Mis-

souri, at which two points storage facilities are available. Dixie Greyhound Lines, Inc., has not to this time paid to [fol. 69] the State of Arkansas any tax upon any gasoline contained in its buses, in excess of twenty gallons, it being the contention of that Company that no tax is due upon such gasoline to the State of Arkansas.

The statement of the witness E. W. Smith to the effect that there are no points within the State of Arkansas on the routes traversed by the Company which offer advantages for the purchase and storage of gasoline, is to be taken to mean that from an operating point of view it is uneconomical to set up facilities at any point within such State, in that the setting up of such facilities would represent an entirely useless expenditure of money on the part of the operating Company. It is physically possible for the Company to create and maintain such facilities in the State of Arkansas; but the sum which would have to be spent in creating and maintaining such facilities would be a complete waste of the money involved.

The statement of the witness E. W. Smith to the effect that all gasoline carried into the State of Arkansas by Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, the States of Tennessee or Missouri, is intended to convey, and should convey, the meaning that such gasoline has paid no tax to the State of Arkansas, it being the contention of Dixie Greyhound Lines, Inc., that no tax thereon is due.

It is a fact that buses operated by the Company between Memphis and Blytheville, and Memphis and Jonesboro, are afforded time, after their arrival at their respective termini and prior to their beginning a return trip over the route, and before passengers are permitted to enter the bus, to refill gasoline tanks at these points, if and provided the Company had available facilities for storing or obtaining gasoline at Blytheville or Jonesboro. If Company storage facilities were maintained in Blytheville and Jonesboro, the gasoline available to the buses at those points could be controlled as to quality, etc., as is the gasoline available at Memphis or other major storage points; but if such gasoline were obtained at Blytheville or Jonesboro, from outside parties, such control would not be practicable.

The interstate rates of Dixie Greyhound Lines, Inc., are under regulation of the Interstate Commerce Commission; and the purely intrastate rates of that Company, in the

various States in which it operates, including the State of Arkansas, are under the regulation of the respective Public Utility regulatory bodies of the various States, the intrastate rates in Arkansas being under the supervision and regulation of the Arkansas Corporation Commission, Regu- [fol. 70] lation of these rates is exercised by the Interstate Commerce Commission and by the State bodies in the same manner as is customary with other utilities under the supervision of those bodies. In practice, rates are proposed by the Company, in the form of tariffs promulgated and filed with the regulatory body; such bodies have the right to suspend such rates if they so desire. With respect to interstate rates, jurisdiction of interstate carriers has been vested in the Interstate Commerce Commission for a short time only, and control by that body over the rates of motor carriers has as yet not become generally effective insofar as details are concerned; but it is the opinion of the industry, and this Company is advised, that the power of control of the Interstate Commerce Commission over interstate rates of motor carriers is the same as that heretofore exercised by the Interstate Commerce Commission over similar rates of railroads.

Referring to the testimony of E. W. Smith, the figure of 2.18 cents per gallon therein stated to be the freight rates on gasoline to Memphis, is the freight rate to Memphis by rail from Oklahoma points, as to which Memphis has no shipping advantages over other points in this immediate vicinity. The freight rates on gasoline from New Orleans to Memphis by rail or water is fifteen (15) cents per hundred pounds, which is equivalent to ninety-nine one-hundredths (.99) of one cent per gallon; while the freight rate by rail from New Orleans to both Jonesboro and Blytheville, Arkansas, is twenty-six and five-tenths (26.5) cents per hundred pounds, or one and three-fourths (1.75) cents per gallon.

All interstate and intrastate business handled by Dixie Greyhound Lines, Inc., over any of its lines traversing the State of Arkansas, is handled in the same buses, and without distinction. The Company does not know what will be the character of the patronage offered to a bus which is about to begin a journey, until the passengers actually offer themselves and purchase tickets. It is not practicable, from an operating point of view, to furnish separate buses or ac-

commodations for interstate or intrastate passengers, or to divide the transportation of the two types of business.

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The above and foregoing was all of the evidence introduced in the case.

PRAYER OF PLAINTIFF FOR APPROVAL OF STATEMENT OF EVIDENCE

Wherefore, Dixie Greyhound Lines, Inc., plaintiff and appellant, prays that the above statement of evidence be set-
[fols. 71-73] tled, approved and allowed by the Court as a true, full and correct statement of all of the evidence given upon the trial of the case, for use in the appeal taken to the United States Court of Appeals for the Eighth Circuit.

Dated July 1, 1938.

Chandler, Shepherd, Owen & Heiskell, Barber & Henry, Attorneys for Plaintiff and Appellant.

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STIPULATION OF COUNSEL APPROVING STATEMENT OF EVIDENCE

It is hereby stipulated that the above and foregoing statement of evidence is true and correct, and may be approved by the Judge without notice.

Chandler, Shepherd, Owen & Heiskell, Barber & Henry, Attorneys for Plaintiff and Appellant.
Louis Tarlowski, Attorneys for Defendant and Appellee.

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APPROVAL OF STATEMENT OF EVIDENCE BY DISTRICT JUDGE

The foregoing statement of evidence is in all respects hereby approved and settled as a true and complete statement of the evidence adduced on the trial of the above entitled action.

Dated July 1st, 1938.

Thomas C. Trimble, United States District Judge.

Endorsed: "Filed July 1, 1938, Sid B. Redding, Clerk."

[fol. 74] ASSIGNMENT OF ERRORS—Filed July 1, 1938

Comes now Dixie Greyhound Lines, Inc., plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal to the United States Circuit Court of Appeals for the Eighth Circuit, herewith petitioner for in said cause, from the decrees of this court entered on the 12th day of April, 1938, and the 27th day of May, 1938:

1

The Court erred in holding as a matter of law, and in decreeing, that the plaintiff herein was not entitled to the injunctive relief sought by it, and in denying such relief, and in dismissing the plaintiff's bill.

2

The Court erred in holding as a matter of law, and in decreeing that Act 67 of the General Assembly of the State of Arkansas for 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, insofar as said Acts, under the testimony and pleadings, apply to the plaintiff herein, are in all respects constitutional and valid; for the reason that the record in the cause shows without dispute that the said Acts, when applied as alleged in the bill and admitted by the answer, impose a direct burden upon interstate commerce, and are contrary to the commerce clause of the Constitution of the United States.

3

The Court erred in holding as a matter of law, and in decreeing, that the State of Arkansas is lawfully entitled, pursuant to Act 11, of the Special Session of the General Assembly of the State of Arkansas for the year 1934 and Act 67 of the General Assembly of the State of Arkansas for the year 1933, to lay and collect a tax of 6½ cents per gallon on each gallon of gasoline, in excess of twenty (20) gallons brought into the State of Arkansas in the tanks of [fol. 75] the plaintiff's interstate buses in the course of interstate journeys; for the reason that the tax in question imposes a direct burden upon interstate commerce, and

is void as contravening the Commerce Clause of the Constitution of the United States.

4

The Court erred in holding as a matter of law that the tax of 6½ cents per gallon imposed by the State of Arkansas, pursuant to Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934 and Act 67 of the General Assembly of the State of Arkansas for the year 1933, upon the gasoline, in excess of twenty gallons, brought into the State of Arkansas in the buses of the plaintiff, in the course of interstate [journesy], is a tax validly levied by the State of Arkansas as compensation to the State for the use of its highways; for the reason that the said tax, so levied, bears no reasonable relation to the use to be made of such highways.

5

The Court erred in holding that the Supreme Court of Arkansas, in the case of Sparling vs. Refunding Board, 189 Ark. 189, 71 S. W. (2nd) 182, has construed the gasoline taxing provisions of Act 11 of 1934 as imposing a privilege tax for the use of the highways; for the reason that the action of said Supreme Court of Arkansas in such case is wholly inconsistent with such construction.

6

The Court erred in holding that it was bound by, and should follow, the expressed construction of the Supreme Court of Arkansas, in the case of Sparling vs. Refunding Board, 189 Ark. 189, 71 S. W. (2nd) 182, to the effect that the gasoline taxing provisions of Act 11 of 1934 impose a privilege tax for the use of the highways of the State; for the reason that the tax imposed by such Act 11 of 1934 imposes a burden upon interstate commerce and deprives the plaintiff of rights secured by the Constitution of the United States, and in such a case the Courts of the United States are not bound by any characterization of the taxing scheme as adopted by the highest court of the State, but are to apply to such taxing scheme the test of operation and effect of the law, as applied and enforced by the State.

7

The Court erred in holding, as a matter of law, that the language of Act 11 of 1934 is properly interpreted to levy [fol. 76] a tax of 6½ cents upon each gallon of gasoline, in excess of twenty gallons, which may be brought into the State of Arkansas in the tanks of buses of plaintiff in the course of an interstate journey, without regard to whether or not such gasoline in excess of twenty gallons is designed or intended for use, or is used, within the State of Arkansas; for the reason that Section 22 of said Act 11 of 1934 specifically provides that "There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or *used in this state* or purchased for sale or *use in this State*," and Section 25 of said Act specifically provides that "The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this State; double taxation is not intended". (Emphasis ours.)

8

The Court erred in making the following finding of fact:

"VI. That the busses, operated by plaintiff over and upon the above described routes, are propelled by gasoline motors, and average approximately five miles for each gallon of gasoline consumed; and that twenty gallons of gasoline will be sufficient for each of its busses, upon the above described routes, to traverse the State of Arkansas and its operations therein."

The said finding of fact is inaccurate and misleading; for the reason that, while the buses of the plaintiff can traverse the State of Arkansas itself on twenty gallons of gasoline, the record shows without dispute that said buses cannot so make the entire journey over the longer route lying between Memphis and proper gasoline storage facilities lying in Missouri; and therefore, the conclusion sought to be drawn by the Court, to the effect that the business of plaintiff is not adversely affected by a limitation to twenty gallons, is erroneous.

9

The Court erred in making the following finding of fact:

"XI. That, the highest Court of last resort of the State of Arkansas has construed the Statutes hereinabove set-

forth, and the tax levied thereunder, to be a privilege tax for the use of the highways, and that the legislature has declared the public policy of the State to be to tax all gasoline [fol. 77] sold or used in this State, for such purposes, in order to prevent fraud and imposition on the State, in the sale or use of a comparatively negligible quantity for other purposes."

The said purported finding of fact is not a finding of fact at all, but is a conclusion of law. As a conclusion of law, it is erroneous for the reason that the actual decision of the Arkansas Supreme Court in question, while characterizing the tax levied under Act 11 of 1934 as a privilege tax for the use of the highways, actually construes such tax as applicable to all nor highway uses, which construction is in complete contradiction of the characterization of such tax as a tax for use of the highways.

10

The Court erred in making the following finding of fact:

"XII. That all of the revenues, derived and collected by the State of Arkansas from the above cited statutes, become a part of the highway revenues of the State of Arkansas, and are devoted, allocated, and used for the purpose of building, maintaining, and improving the highways of the State of Arkansas, and for the payment of principal and interest upon outstanding highway obligations; and that no part of said revenues goes into, or becomes a part of, the General Revenue Fund of the State of Arkansas."

The situation therein referred to, if it exists, is immaterial in the present controversy, for the reason that any obligations incurred by the State of Arkansas for highway construction or maintenance are general obligations of the State, for which its responsibility is not limited to gasoline tax revenue, but the statutory provision with respect to application of such revenue is merely a financial arrangement of the State to make certain the payment of its general obligations.

11

The Court erred in making the following finding of fact:

"XIII. That the tax imposed under the statutes herein involved, and the payment thereof by the plaintiff, will not

work an undue hardship upon it, nor materially increase its expense of operation, and does not unduly burden or confiscate the business of the plaintiff."

The said finding is supported by no evidence whatever and is directly contrary to all of the undisputed evidence in the record; and further, it appearing without dispute that the imposition of such tax imposes a direct burden upon interstate commerce, the amount or severity of such burden is [fol. 78] immaterial, and it is not necessary in such a case that the burden should amount to a confiscation of the plaintiff's business.

12

The Court erred in making the following finding of fact:

"XIV. That the plaintiff is amenable and subject to the provisions of Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, and should pay tax at the rate of 6½¢ per gallon upon all gasoline, in excess of twenty gallons, brought into the State of Arkansas, in the tanks of its buses."

The said purported finding of fact [—] at all, but is a conclusion of law. As such it involves in effect the entire legal question of the case, and therefore is not entitled to the status of a finding of fact, or to be given weight as such.

13

The Court erred in making the following finding of fact:

"XV. That the plaintiff can operate its busses within the State of Arkansas, over the routes heretofore set forth, upon twenty gallons of gasoline, and that, therefore, no extra burden or increased cost is placed upon it by the statutes hereunder attacked."

The said finding of fact is unsupported by any proof and is contrary to the undisputed evidence in the record, wherein it appears without dispute that the buses of the plaintiff cannot bake their runs between Memphis, Tennessee, and either Jonesboro or Blytheville, Arkansas, on twenty gallons of gasoline, and further, that while the buses on the

route between Memphis and St. Louis can actually traverse the State of Arkansas itself on twenty gallons, they cannot so traverse the distance lying between Memphis and storage points in Missouri; in either of which cases extra burden is placed upon the plaintiff by the statutes referred to.

14

The Court erred in making the following finding of fact:

"XVI. That, under its schedules of operation, ample time is afforded the plaintiff to refill its fuel tanks at its Arkansas termini, prior to beginning a return trip, and before passengers are permitted to enter, and without danger or inconvenience to its passengers and the traveling public."

[fol. 79] Said finding of fact is erroneous in fact, the record showing without dispute that time for filling tanks is available only at Jonesboro and Blytheville, and only for local buses, and not available to the through buses operating on the Memphis-St. Louis route.

15

The Court erred in making the following finding of fact:

"XVII: That it is physically possible for plaintiff to build and maintain within the State of Arkansas, gasoline storage facilities ample for its requirements and needs."

The said finding of fact is misleading in that, while true as stated, it ignores and fails to give effect also — the further undisputed and co-related fact that such facilities, if constructed, would be useless, and the added expense of same a burden upon interstate commerce.

16

The Court erred in making the following finding of fact:

"XVIII. The Court further finds that the demand made upon the Plaintiff by the Defendant herein, requiring it to pay the tax in question, is a valid demand."

The said purported finding of fact is not a finding of fact at all, but is a conclusion of law. As such, it is not entitled to the status of a finding of fact or to be given weight as such.

17

The court erred in making the following conclusions of law:

"I. That the relief sought by the plaintiff should be denied, and its application for an injunction against the Defendant should be dismissed."

"II. That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, 27, and 28 of Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, in so far as the same applies to and effects the plaintiff, is constitutional and valid, and is not violative of Article 1, Section 8, Clause 3 of the Constitution of the United States."

"III. That the demand of the Defendant upon the Plaintiff for the payment of the tax in question is a valid demand, and plaintiff is liable for the payment thereof."

"IV. That Act 67 of the General Assembly of the State of Arkansas for the year 1933, as amended by Sections 22, 25, [fol. 80] 27, and 28 of the Act 11 of the Special Session of the General Assembly of the State of Arkansas for the year 1934, is constitutional and valid, and is not violative of Amendment 14, commonly known as the due process clause of the Constitution of the United States."

The said conclusions of law, collectively reaching the legal conclusion that the Acts of the State of Arkansas therein mentioned are valid as applied to the plaintiff, are erroneous for the reason that the tax therein imposed upon gasoline brought into the State in the tanks of buses engaged in interstate journeys constitutes a direct burden upon interstate commerce and bears no reasonable relation to the use to be made of the highways of the state.

18

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff.

"I. The tax in question is levied upon and the amount thereof fixed by the number of gallons of gasolien which happen to be in the fuel tanks of the motor vehicles at the time such vehicles cross a state line into Arkansas; and such

tax has no relation to the number of miles of highways of the State of Arkansas over which the vehicle is to pass, or to the amount of use of such highways, or to the amount of wear and tear incident to such use of such highways, by such motor vehicle."

The facts contained in such requested finding were nowhere else found or mentioned by the Court, but were essential to the proper consideration and decision of the case and were undisputed in the record.

19

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"II. The tax in question is a tax upon gasoline brought in other states and brought into the State of Arkansas in the fuel tanks of the motor vehicles, and is levied upon and the amount thereof is fixed by the number of gallons of gasoline contained in said fuel tanks regardless of whether said gasoline is used in propelling such motor vehicle over the highways of the State of Arkansas or is carried through the State of Arkansas into other states and used in propelling such motor vehicles over the highways of other states."

[fol. 81] The facts contained in such requested finding were nowhere else found or mentioned by the Court, but were essential to the proper consideration and decision of the case and were undisputed in the record.

20

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"III. The Commissioner of Revenues of the State of Arkansas has demanded that the plaintiff pay to the State of Arkansas a gasoline tax of 6½ cents per gallon upon each gallon of gasoline, in excess of 20 gallons, brought into the State in the tanks of its buses, without regard to whether such gasoline is used in propelling the bus within the State of Arkansas, or is used in propelling the bus in other states, or was intended merely as a reserve to provide for con-

tingencies or emergencies. Such demand by the defendant was made pursuant to a conception of duty as Commissioner of Revenues of the State of Arkansas, under the terms of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, and Act 67 of the General Assembly of Arkansas of 1933."

The facts contained in such requested finding were nowhere else found by the Court, but were essential to the proper consideration and decision of the case, and were alleged in the bill and admitted by the answer.

21

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"IV. In addition to the facts found by the Court in paragraph IV of his findings heretofore filed, the following: "Upon this route 261.8 miles are within the State of Missouri, and three miles are within the State of Tennessee."

A finding of the undisputed facts, herein requested by plaintiff to be found, was essential to give an accurate picture of the routes operated by the plaintiff and to indicate with fairness how much of the normal gasoline capacity of the buses is required for operations outside of the State of Arkansas.

[fol. 82] 22

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"V. In addition to the facts found by the Court in paragraph VI of his findings heretofore filed, the following: "But such buses cannot be operated from Memphis to Jonesboro and return upon 20 gallons of gasoline; or from Memphis to Blytheville and return on 20 gallons of gasoline. That while such buses can actually traverse the State of Arkansas on the route from Memphis to St. Louis without using an entire 20 gallons such 20 gallons is insufficient to carry the bus the entire distance between Memphis and Caruthersville, at which point such facilities are available. In no single instance can the buses of the plaintiff run from Memphis to their termini and return, or from Memphis to

the next gasoline storage facilities of the plaintiff, on 20 gallons of gasoline.

A finding of the undisputed facts herein requested by plaintiff was necessary to amplify and correct the Court's finding of fact No. VI.

23

The Court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

"VII. That the facts found by the Court in paragraph XII of his findings heretofore filed, be amended so as to designate the percentage of tax applied to different highway uses, as provided in the statutes, as follows:

"All net tax derived from motor vehicle under the provisions of the statutes above cited, shall be divided 92.3% shall be deemed State highway revenue, and 7.7% shall be deemed County Highway improvement revenue," and shall be expended in accordance with the provisions of said legislative enactments as set out in the Code Sec. 6604."

A finding of additional facts, as herein requested by the plaintiff was necessary in order to amplify and correct the Court's Finding of Fact No. XII; the additional facts being from the same source as those set out in the Court's own Finding.

24

The court erred in failing and refusing to make the following additional finding of fact, pursuant to motion of the plaintiff:

[fol. 83] "VIII. In connection with the findings 13, 15, 16, 17, the Court is asked to find the following:

"Since the cost of motor fuel is one of the principal expenses in furnishing transportation and since the plaintiff operates as a certified public carrier, supervised by the State Commissions and the Interstate Commerce Commission, it is necessary to the efficient operation of the company that it should exercise diligence in purchasing gasoline as cheaply as possible and in obtaining a uniform quality and proper grade of gasoline for the effect of increasing the cost of the

motor fuel is ultimately to increase the cost of transportation furnished."

"It is impracticable from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey.

"The filling of gasoline tanks in buses at roadside filling stations in a casual manner also constitutes a risk to the passengers on such bus, a delay in the service, incidental road failures and an inconvenience to the passengers.

"The plaintiff maintains major gasoline storage facilities at Memphis, Tennessee, and St. Louis, Missouri. Each of these cities offers water transportation and is strategically located with respect to the routes traveled by the plaintiff's buses, affording the plaintiff an opportunity to have cheaper gasoline available at convenient localities.

"While it is physically possible for the company to create and maintain gasoline storage facilities in the State of Arkansas, from an operating point of view it is uneconomical to set up such facilities at any point within such State on the lines of the plaintiff. There is no point within the State of Arkansas, on any of the routes traversed by the plaintiff within that State which offers advantages for the efficient purchase and storage of gasoline, or where the acquisition and maintenance of storage facilities would not be a useless expense and waste of money involving unnecessary duplication of facilities."

A finding of additional and undisputed facts, as herein requested by the plaintiff, was necessary to correct the errors, inaccuracies and omissions of the Court in its own Findings of Fact Nos. XIII, XIV, XVI, and XVIII.

[fol. 84] 25

The Court erred in failing and refusing to make the following additional conclusion of law, pursuant to motion of the plaintiff.

"I. There is no sufficient relation between the measure employed in fixing the amount of the tax hereunder consideration and the extent or manner of use by the plaintiff of the highways of the State of Arkansas to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses."

Such additional conclusion of law was a proper conclusion to be drawn from the undisputed facts in the record, which facts had been ignored by the Court.

26

The Court erred in failing and refusing to make the following additional conclusion of law, pursuant to motion of the plaintiff:

"II. As a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, the charge levied must be necessarily predicated upon the use made or to be made, of the highways of the state, the number of miles traveled, of the degree of wear and tear incident to such use, and cannot be arbitrary or unrelated to the amount of such use.

"The foregoing conclusions of law are based upon the recent case of Interstate Transit Company, Inc. vs. Lindsey, County Court Clerk, 283, U. S. 183, 51 Supreme Court, 380."

27

The Court erred in failing and refusing to make the following additional conclusion of law, pursuant to motion of the plaintiff:

"III. That the aforesaid acts of the State of Arkansas, as interpreted by the defendants and sought to be applied against the plaintiff, are invalid as contrary to Article I, Section 8, Clause 3 being the so-called commerce clause, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. The tax in question purporting to be a license or privilege tax, cannot be sustained as a valid license or privilege tax for the use of the highways of the State of Arkansas."

Such additional conclusion of law was a proper conclusion, and was designed to correct the erroneous conclusions arrived at by the court in its own Conclusions of Law.

[fols. 85-90] 28

The Court erred in failing and refusing to grant the motion of the plaintiff for a rehearing and oral argument of the case, and in entering a decree overruling such motion.

Wherefore, the plaintiff prays that the said decree be reversed, and that the District Court of the United States for the Eastern District of Arkansas, Western Division, be di-

rected to grant the relief prayed for in the bill, and to enter a decree accordingly.

Dated June 30, 1938.

Chandler, Shepherd, Owens & Heiskell, Barber & Henry, Attorneys for Plaintiff and Appellant, Dixie Greyhound Lines, Inc.

[File endorsement omitted.]

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[fol. 91] In United States Circuit Court of Appeals, Eighth Circuit

No. 11,284—November Term, A. D. 1938

Dixie Greyhound Lines, Inc., Appellant,

vs.

Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, Appellee

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Mr. A. L. Heiskell (Mr. J. H. Shepherd, Mr. A. L. Barber, Mr. E. A. Henry, Messrs. Chandler, Shepherd, Owen & Heiskell and Messrs. Barber & Henry were with him on the brief) for Appellant.

Mr. Louis Tarlowski, Special Counsel for the State of Arkansas (Mr. J. Hugh Wharton, Attorney for State Revenue Department of Arkansas, was with him on the brief) for Appellee.

Before Gardner, Sanborn and Van Valkenburgh, Circuit Judges

Opinion—February 25, 1939

Sanborn, Circuit Judge, delivered the opinion of the Court:

This is a suit in equity brought by the appellant, a Delaware corporation and a common carrier of passengers by bus in interstate commerce, against the Commissioner of [fol. 92] Revenue of the State of Arkansas, for an injunction against the proposed application to it of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, and Act 67 of the General Assembly of Arkansas of 1933. Act 11 provides for the imposition of a tax of 6½ cents per gallon on all gasoline sold or used in the State of

Arkansas.[1] Act 67 prohibits any person from driving into the State any motor vehicle carrying more than 20 gallons of gasoline in its fuel tank, until the tax upon the excess has been paid.[2] The court below denied an injunction and dismissed the bill of complaint.

The plaintiff in its bill alleged, and the evidence disclosed, that the Commissioner of Revenue was demanding that the appellant pay to the State, under threat of the penalties provided by law, 6½ cents on every gallon of gasoline in excess of 20 gallons which was brought into the State in the fuel tanks of its interstate busses; that the appellant was an interstate carrier by bus, was duly qualified to operate in Arkansas and other states, and was subject to regulation as to its business and rates as such carrier; that it was a large user of gasoline, the cost of which was necessarily reflected in its rates and charges; that it was necessary to the proper and economical operation of its business that it have storage facilities for gasoline outside of the State of Arkansas; that the erection of such facilities within the State would be uneconomical and wasteful; that because of the distances traversed by its interstate busses in Arkansas and because of the normal gasoline consumption of such busses (5 miles per gallon), it was impractical, inconvenient and dangerous to have such busses enter Arkansas with 20 gallons or less of gasoline in their gas tanks and to rely upon refueling such busses at roadside filling stations in Arkansas; and that, as [fol. 93] a result of the threats of the Commissioner, the appellant was placed in the position of having to adopt one of three alternatives: (1) restricting the amount of gasoline

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[1] "Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"'(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State.'"

[2] "Section 1. On and after the passage of this Act it shall be a violation of the law for any person, co-partnership or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used

in the fuel tanks of interstate busses entering Arkansas to 20 gallons, thereby assuming the risk of road failures, stoppages and inconvenience, and necessitating refueling such busses at roadside points in Arkansas, with consequent delay, fire hazard, and increased cost of operation; (2) setting up in Arkansas storage facilities for gasoline, at great expense; or (3) paying the tax of 6½ cents on every gallon in excess of 20 gallons brought into Arkansas in the fuel tanks of its interstate busses, regardless of whether such excess was used in that State or not.

The practical operation of the challenged tax as applied to the appellant's business can best be shown by considering its effect upon the appellant in connection with the busses which it operates between Memphis, Tennessee, and St. Louis, Missouri, a distance of 342.7 miles. The appellant maintains storage facilities for gasoline at both of these points, where water transportation is available and gasoline can be purchased in bulk at favorable prices. The appellant pays in Tennessee the taxes imposed by the laws of that State upon the gasoline which it stores in Memphis; it pays in Missouri the taxes on its gasoline stored in St. Louis. The bus leaving Memphis for St. Louis carries in its fuel tank enough gasoline to make the entire trip to St. Louis (approximately 70 gallons). It travels three miles in Tennessee before reaching the Arkansas line. It travels through Arkansas a distance of 77.9 miles, using approximately 16 gallons of gasoline in that State. The remainder of the gasoline in the fuel tank is consumed in traveling from the Arkansas line to St. Louis, a distance of 261.8 miles, upon the highways of Missouri. In returning from St. Louis to Memphis, the bus is fueled at St. Louis. In entering Arkansas it may or may not have in excess of 20 gallons in the fuel tank, depending, of course, upon how many gallons it started with from St. Louis. Assuming that the bus, in traveling each way, had 70 gallons in its fuel tank,

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as motor fuel in said truck or motor vehicles until the state tax thereon has been paid.

"Section 2. Any person, co-partnership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one Hundred ($100) dollars. Each load carried into the state shall constitute a separate offense.

. . . . . ."

it would pay to the State of Arkansas on its trip north a tax on approximately 69 gallons of gasoline, while upon its return it would pay no tax at all, although the wear and tear upon the highways of Arkansas would be the same on each trip.

[fol. 94] The appellant does not now contend that the tax of which it complains may not be imposed by the State of Arkansas with respect to gasoline consumed or to be consumed upon the highways of Arkansas, as compensation for the use of the highways, but it does contend that that State may not impose a tax upon gasoline which is carried in interstate commerce for use in Missouri or Tennessee, because that would constitute a direct and unreasonable burden upon interstate commerce.

The tax in suit is a tax imposed for highway purposes. This is so because the revenues derived from the tax are segregated for such purposes. Moreover, the Supreme Court of Arkansas, in Sparling v. Refunding Board, 71 S. W. (2d) 182, 186, has said that the Arkansas gasoline tax is "a privilege tax, a tax on the privilege of selling and using gasoline in this state, payable at the source • • • for substantially the only available use to which it may be put, for highway travel," and (p. 186) "is not a property tax, but is a privilege tax for the use of the highways." Whether that court meant that it was a tax on all gasoline, however used, for the privilege extended to the user of the gasoline of making use of the highways of the State, or was a tax on all gasoline for the benefit of the highways, we think it is not necessary for us to determine. The decision of that court is controlling as to the meaning and extent of the requirements of the taxing act, Hicklin v. Coney, 290 U. S. 169, 172, and there can be no question that the tax is imposed for highway purposes.

Reduced to its lowest possible terms, the question for decision, we think, is whether the imposition of the tax upon gasoline carried, for use in other states, in the fuel tank of a motor vehicle traveling in interstate commerce can be sustained.

That the tax is a direct burden on interstate commerce, cannot be controverted.

If it is to be sustained at all with respect to gasoline to be used in other states, it must be sustained upon the theory that the method employed for determining the amount of the

tax constitutes a fair measure for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of the highways of the State. In Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 186, the Supreme Court said:

[fol. 95] "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. v. Blodgett, 276 U. S. 245; or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra [274 U. S. 554] or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252. Compare Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51. But the mere fact that the tax falls upon one who usesc the highway is not enough to give it presumptive validity."

While we can understand how the use of state highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one state can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another state.

We think this case is ruled by Interstate Transit, Inc. v. Lindsey, supra. There the court had under consideration an Act of Tennessee which imposed a tax upon persons operating interstate motor busses on the highways of that State, which tax was graduated according to the passenger-carrying capacity of the busses. The court demonstrated that the tax was not imposed for highway purposes or as compensation for the use of the highways, but was imposed for the privilege of doing business in Tennessee. The court then considered whether the passenger-carrying capacity of a bus was a reasonable measure for determining compen-

sation for use of the highways. It said, in this connection (p. 190 of 283 U. S.):

"It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, States may tax the privilege of doing an intrastate bus business without regard to whether [fol. 96] the charge imposed represents merely a fair compensation for the use of their highways. Compare Gundling v. Chicago, 177 U. S. 183, 189. But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. Clark v. Poor, supra. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

The rule that the measure of the compensation exacted by a state from an interstate carrier for the use of its highways must have some reasonable relation to the use which that carrier makes of the highways, has not been modified or overruled. It is true that in Hicklin v. Coney, 290 U. S. 169, 173, the Supreme Court said:

"Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the 'carrying capacity' of the vehicles. The state court held that the fees 'are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensa-

tion for their use.' The statute provides for the segregation, for this purpose, of the moneys collected. See Clark v. Poor, 274 U. S. 554, 555-557. In this view the fees are not open to the objection raised in Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 186, 188. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this [fol. 97] reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. Morris v. Duby, 274 U. S. 135, 143; Sproles v. Binford, 286 U. S. 374, 388, 389. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose. Clark v. Poor, supra."

This language we do not regard as modifying Interstate Transit, Inc. v. Lindsey, supra, which was cited with approval in Aero May Transit Co. v. Georgia Commission, 295 U. S. 285, 289; Morf v. Bingaman, 298 U. S. 407, 410; Ingels v. Morf, 300 U. S. 290, 294.

Since we can perceive no reasonable relation between the amount of gasoline carried through Arkansas in the fuel tank of an interstate bus for use in states other than Arkansas and the use which that bus makes of the highways of Arkansas, we think that the State was powerless to include such gasoline in measuring the compensation to be paid by the appellant for the use of the highways of the State.

There is, we think, another vice which inheres in this taxing statute as sought to be applied by the taxing authorities. It imposes a direct burden not only upon the interstate commerce done by the appellant in the State of Arkansas, but also upon the interstate commerce which it carries on in other states. By taxing the means whereby a bus makes a through trip from Memphis to St. Louis, the State taxes gasoline which is merely transported through Arkansas for use in interstate commerce in Missouri. The weight of the gasoline is negligible and by no stretch of the imagination can it be said to increase the wear and tear upon the highways of Arkansas. That portion of the gasoline in the fuel tanks of these interstate busses which is intended for

use and is used in states other than Arkansas is the medium whereby the appellant carries on interstate commerce in those states. To tax that medium is to directly and unjustifiably burden that commerce. Helson, et al. v. Kentucky, 279 U. S. 245, 252.

Another consideration which militates against sustaining the sort of tax which Arkansas seeks to exact from the appellant here is that that would open the door to the cumu- [fol. 98] lative taxation of the same gasoline by all states through which an interstate motor vehicle passes. If it were possible for a bus starting from New York City for Los Angeles, California, to carry enough fuel for the entire trip, it might be subjected to such a tax as is here complained of upon the contents of its fuel tank at the borders of each state through which it passed. It is our understanding that, while a state may require an interstate carrier operating within its borders to bear its proportionate share of the burden of government, it may not tax that part of the commerce which is done by that carrier in other states. Fargo v. Michigan, 121 U. S. 230; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255-257.

The decree appealed from is reversed and the court below is directed to enter a decree in favor of the appellant, enjoining the appellee from enforcing the challenged tax against it with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states.

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[fol. 99] In United States Circuit Court of Appeals, Eighth Circuit

No. 11284

Dixie Greyhound Lines, Inc., Appellant,

vs.

Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas

Decree—February 27, 1939

Appeal from the District Court of the United States for the Eastern District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court appealed from, in this cause be, and the same is hereby, reversed with costs; and that the Dixie Greyhound Lines, Inc., have and recover against Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, the sum of —— Dollars for its costs in this behalf expended, to be collected in accordance with law.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said District Court with directions to enter a decree in favor of the appellant, Dixie Greyhound Lines, Inc., enjoining the appellee, Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, from enforcing the challenged tax against it with respect to all gasoline in the fuel tanks of its interstate buses which is being carried through Arkansas for use in other States.

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[fol. 100] In United States Circuit Court of Appeals

Petition of Appellee for Rehearing—Filed March 13, 1939

* * * * * * *

Comes the Appellee herein, and respectfully petitions the Court for a rehearing in this matter, and for cause therefor states:

That, in its opinion, this Court inadvertently overlooked the question presented by oral argument as to whether the lower court, and this Court, by the pleadings and proof, had and acquired jurisdiction to hear and determine this cause. That is to say, that the record in this case does not show, except by an allegation in the complaint and by an admission in the answer, that there is involved in this controversy a sum in excess of $3,000.00, exclusive of interest and costs; and that, when such question is considered by this Court, it will be ascertained that Plaintiff in the lower court, and appellant in this Court, has not brought itself within the protection of the Federal Court.

* * * * * * *

Respectfully submitted, J. Hugh Wharton, Attorney for State Revenue Department of Arkansas; Louis Tarlowski, Special Counsel for the State of Arkansas, Attorneys for Appellee.

[fol. 101] CERTIFICATE OF COUNSEL

I, Louis Tarlowski, of counsel for Appellee in the foregoing cause, do hereby certify that the foregoing Petition for Rehearing is filed in good faith, and is believed to be meritorious, and is not filed for the purpose of vexation or delay.

Louis Tarlowski.

[File endorsement omitted.]

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—March 21, 1939

The petition for rehearing filed by counsel for appellee in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

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[fol. 102] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLEE FOR APPEAL TO SUPREME COURT, U. S. —Filed May 13, 1939

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Circuit:

Your petitioner, the above named Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, respectfully shows.

On the 25th day of February, 1939, the court filed its opinion in this cause holding Act 11 of the Special Session of the General Assembly of Arkansas for 1934, page 28, and Act 67 of the General Assembly of Arkansas for 1933, page 194, invalid because in violation of the Commerce Clause of the Constitution of the United States, Article 1, Section 8, Clause 3; and ordered the entry of a decree, the effect of which is to prevent your petitioner from enforcing said statutes against Dixie Greyhound Lines, Inc., the above named appellant.

Your petitioner further respectfully states that said final decree is erroneous and is greatly to the prejudice and injury of your petitioner. The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors and prayer for reversal filed in the office of the Clerk of this Court, and presented here-

with, pursuant to Rule 9 of the Rules of the Supreme Court of the United States.

There has likewise been filed in the Clerk's office, and there is presented herewith, a statement as to the jurisdiction of the Supreme Court of the United States on appeal as provided by Rule 12 of the Rules of the Supreme Court of the United States.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors [fol. 103] complained of, your petitioner prays for the allowance of an appeal in this cause from the said holding and decision of this Court to the Supreme Court of the United States, agreeably to the Statutes and Rules of the Supreme Court of the United States in such cases made and provided.

Your petitioner further prays for citation as provided by law and Rule 10 of the Rules of the Supreme Court of the United States, directed to the above named Dixie Greyhound Lines, Inc.

Frank Pace, Jr., Louis Tarlowski, Attorney for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, the Above Named Petitioner.

[File endorsement omitted.]

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IN UNITED STATES CIRCUIT COURT OF APPEALS

ASSIGNMENT OF ERRORS ON APPEAL TO SUPREME COURT, U. S. —Filed May 13, 1939

The above named Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, at the time of filing and presenting his petition for appeal to the Supreme Court of the United States from the decision entered against him in this cause by the United States Circuit Court of Appeals, Eighth Circuit, on the 25th day of February, 1939, and from the order of said court overruling his petition for a rehearing, files and presents to said court the following assignment of errors upon which he will rely in said appeal:

1

The court erred in holding that Act 67 of the General [fol. 104] Assembly of Arkansas of 1933, page 194, violates the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States.

2

The court erred in holding that said Act 67 of the General Assembly of Arkansas of 1933, page 194, and Section 22 of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, page 28, violate the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States, or the Fourteenth Amendment to the Constitution.

3

The court erred in holding said acts unconstitutional, because the evidence shows (a) that on some of the company's routes the busses can be and are operated during the entire time while in Arkansas on less than twenty gallons of gasoline, and (b) that on all of the routes said busses can be so operated that all of the gasoline in the fuel tanks in excess of twenty gallons at the time the busses enter Arkansas will be consumed in Arkansas.

4

The court erred in holding that inconvenience which may be suffered by Dixie Greyhound Lines, Inc., in complying with said acts affords a sufficient ground for declaring said acts unconstitutional.

5

The court erred in holding said acts unconstitutional, because said acts afford a necessary and practical and valid means of collecting the gasoline tax from interstate motor vehicle operators using the state's highways.

[fols. 105-122]

6

The court erred in holding said acts unconstitutional, because in their practical operation they do not necessarily require a motor vehicle operator to pay a tax upon gasoline he uses in another state.

7

The court erred in holding that because of the plan of carrying on its business adopted by Dixie Greyhound Lines, Inc., said acts are unconstitutional.

8

The court erred in holding said acts unconstitutional on the ground that they impose a tax upon gasoline used in other states.

9

The court erred in holding that said acts impose an unconstitutional burden upon interstate commerce.

10

The court erred in holding that the fact that the acts may require a motor vehicle operator to pay to Arkansas the Arkansas tax upon gasoline which such operator uses in another state renders the acts unconstitutional.

Wherefore, the said Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, prays that the decision and judgment of the Circuit Court of Appeals of the Eighth Circuit be reversed, that said acts be declared constitutional, and that the decree of the District Court be affirmed.

Frank Pace, Jr., Louis Tarlowski, Attorneys for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas.

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[fol. 123] In United States Circuit Court of Appeals

Order Allowing Appeal to the Supreme Court, U. S.—Filed May 13, 1939

The petition of Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, for an appeal in the above entitled cause to the Supreme Court of the United States from the decision of this Court in the above entitled cause filed February 25, 1939, having been filed herein, accompanied by an assignment of errors and a statement as to jurisdiction of the Supreme Court of the United States, as provided by the Rules of the Supreme Court of the United States, and the said papers having been presented to the undersigned Judge, and the record in this cause having been considered;

It is hereby ordered, that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the decision of this Court filed in this cause on February 25, 1939, and the order of this Court overruling the petition for a rehearing filed by this petitioner, and that the Clerk of this Court shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the Court, a true copy of the

material parts of the record herein to be designated as provided by the Rules of the Supreme Court of the United States.

It is further ordered, that citation issue to Dixie Greyhound Lines, Inc., as provided by law and the Rules of the Supreme Court.

It is further ordered, that the said Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, file security for costs in the penal sum of $250.

It is further ordered that until this appeal is finally deter- [fols. 124-126] mined no mandate shall issue from this Court.

Done and entered this 13th day of May, 1939.

John B. Sanborn, Judge of the United States Circuit Court of Appeals, Eighth Circuit.

[File endorsement omitted.]

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[fol. 127] IN UNITED STATES CIRCUIT COURT OF APPEALS

PRAECIPE FOR TRANSCRIPT ON APPEAL TO SUPREME COURT, U. S.—Filed May 26, 1939

To the Clerk of the United States Circuit Court of Appeals, Eighth Circuit:

For the purpose of the record on appeal in the above entitled cause, please prepare, certify and transmit to the clerk of the Supreme Court of the United States a transcript of the following from the files and records of your Court in said cause:

(1) The entire printed transcript of record.

(2) The decision and opinion of your Court filed February 25, 1939.

(3) The following, only, from the printed "Petition for Rehearing and Brief Thereon" filed by attorneys for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas:

The petition for rehearing on page 2, and the signatures of counsel and certificate of counsel on page 11.

(4) Order denying petition for rehearing.

(5) Petition for appeal to Supreme Court of the United States.

(6) Assignment of Errors and prayer for reversal filed May 13, 1939.

[fols. 128-131] (7) Statement as to jurisdiction of the Supreme Court of the United States.

(8) Order allowing appeal to the Supreme Court of the United States.

(9) Citation signed by Judge Sanborn on May 13, 1939, with proof of service.

(10) Notice pursuant to paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States, and proof of service upon Dixie Greyhound Lines, Inc., of copies of the petition for appeal, assignment of errors, statement as to jurisdiction, and order allowing appeal.

(11) Cost bond on appeal to Supreme Court.

(12) This praecipe.

Dated this 14 day of May, 1939.

Frank Pace, Jr., Louis Tarlowski, Attorneys for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas.

Service of the foregoing praecipe for transcript of the record on appeal and receipt of copy thereof acknowledged this 19 day of May, 1939.

Dixie Greyhound Lines, Inc., By Chandler, Shepherd, Owen & Heiskell, Its Attorneys.

[File endorsement omitted.]

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[fol. 132] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Order Enlarging Time to Docket Appeal

The time within which the appeal and record on appeal in the above entitled case may be docketed in the Supreme

Court of the United States is hereby enlarged to and including the 3rd day of July, 1939.

Dated June 22, 1939.

John B. Sanborn, U. S. Circuit Judge.

[fol. 132½] [File endorsement omitted.]

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[fol. 133] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS TO BE RELIED UPON BY APPELLANT, AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED.—Filed July 7, 1939

The appellant above named, in compliance with paragraph 9 of Rule 13 of the Rules of the Supreme Court, does now make and file the following statement:

I

The points to be relied upon by appellant are the assignments of error filed by him in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in this cause, and which are included in the transcript of record on appeal in this cause filed or to be filed in the office of the Clerk of the Supreme Court of the United States.

[fol. 134]

II

The parts of the record necessary for the consideration of said points and which should be printed are:

(1) The following parts of the printed "Transcript of Record" from the Circuit Court of Appeals which was filed and used as the printed record in the Circuit Court of Appeals:

(a) Bill of Complaint, pages 1-12, and filing endorsement on page 13.

(b) Amendment to original bill of complaint, pages 14-15.

(c) Motion to dismiss and answer of defendant, pp. 15-22.

(d) Order substituting Z. M. McCarroll, Commissioner of Revenues, etc., as defendant in the place of Earl Wiseman, printing only, however, the name of the Court on page 25, the order commencing with the fifth line from the foot

of page 25 to and including the signature of the District Judge on page 26, and the filing endorsement.

(e) Stipulation relating to application for preliminary injunction, etc., page 26.

(f) Findings of fact and conclusions of law of the District Court, pages 36-40.

(g) Opinion of the District Court, pages 41-44.

(h) Decree, pages 54-55.

(i) Abstract of testimony, pages 62-71, to and including order of District Judge on page 71, and filing endorsement.

(j) Assignment of errors, pages 74-85.

(2) Decision of the United States Circuit Court of Appeals for the Eighth Circuit.

(3) Petition of Z. M. McCarroll, Commissioner, etc., for rehearing.

[fol. 135] (4) Order denying petition for rehearing.

(5) Petition for appeal to Supreme Court.

(6) Assignment of errors and prayer for reversal.

(7) Order allowing appeal to Supreme Court of the United States.

(8) Praecipe for transcript of the record from the Circuit Court of Appeals.

(9) The foregoing statement of points to be relied upon and designation of the parts of the record to be printed.

(10) Order enlarging time to docket appeal.

Dated this 5th day of July, 1939.

Frank Pace, Jr., Amos M. Matthews, Attorneys for Appellant.

Service of the foregoing statement of the points to be relied upon by Appellant, and designation of the parts of the record to be printed, and receipt of copy thereof, acknowledged this 3rd day of July, 1939.

Chandler, Shepherd, Owen & Heiskell, Attorneys for Appellee.

[fol. 136] [File endorsement omitted.]

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION BY APPELLEE OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED—Filed July 22, 1939

The appellee above named, in compliance with paragraph 9, of Rule 13 of the Rules of the Supreme Court, hereby designates to be printed the following portions of the record, in addition to those parts of such record heretofore designated by the appellant:

(1) The following parts of the printed "Transcript of Record" from the Circuit Court of Appeals for the Eighth Circuit, which was filed and used as the printed record in the Circuit Court of Appeals:

(a) Petition of plaintiff for rehearing and for oral argument, pages 44 through 49, and filing endorsement on page 50. Here insert (in lieu of recopying such petition as later filed in identical terms—Record pages 55-60) the following: "Refiled in identical terms on April 22, 1938."

[fol. 138] (b) Motion of plaintiff for additional findings of fact and conclusions of law, pages 50 through 54, and filing endorsement on page 54.

(c) Order overruling petition for rehearing and motion for additional findings of fact and conclusions of law, pages 60 through 61, and filing endorsement on page 61.

Dated this 6th day of July, 1939.

Walter Chandler, J. H. Shepherd, A. L. Heiskell, Chandler, Shepherd, Owen & Heiskell, Attorneys for Appellee.

Service of the foregoing designation of parts of the record to be printed, and receipt of copy thereof, acknowledged this 6th day of July, 1939.

Frank Pace, Jr., Attorney for Appellant.

[fol. 139] [File endorsement omitted.]

Endorsed on cover: File No. 43,545. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 138. Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, Appellant, vs. Dixie Greyhound Lines, Inc. Filed June 26, 1939. Term No. 138, O. T., 1939.

FILE COPY

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1939

## No. 138

Z. M. McCARROLL, Commissioner of Revenues of the State of Arkansas,

*Appellant,*

*vs.*

DIXIE GREYHOUND LINES, INC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## STATEMENT AS TO JURISDICTION.

Amos M. Mathews,
Frank Pace, Jr.,
Louis Tarlowski,

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1939**

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## No. 138

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Z. M. McCARROLL, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS,

*vs.* *Appellant,*

DIXIE GREYHOUND LINES, INC.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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## STATEMENT AS TO JURISDICTION OF THE SUPREME COURT, UNITED STATES.

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The above named Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, at the time of filing and presenting his petition for appeal to the Supreme Court of the United States from the decision entered against him in this cause by the United States Circuit Court of Appeals, Eighth Circuit, on the 25th day of February, 1939, and the order of said court overruling his petition for a rehearing, files and presents to said court this statement that the basis of the jurisdiction of the Supreme Court of

the United States to review said decision and order upon appeal is the following:

(a) The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States are Paragraph (b) of Section 240, Judicial Code, Title 28, U. S. C., Section 347(b).

(b) The validity of Act 67 of the General Assembly of Arkansas of 1933, page 194, and of part of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, page 28, are involved in this cause. The pertinent provisions of said Acts are set out *verbatim* on pages 3-4 of this statement.

(c) The decision of the United States Circuit Court of Appeals, Eighth Circuit, sought to be reviewed, was filed on the 25th day of February, 1939 (101 F. (2d) 572). A copy of the decision is hereto annexed. Thereafter a petition was filed by Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, for a rehearing, and an order was entered denying said petition on March 21, 1939. The order allowing this appeal to the Supreme Court of the United States was made by a judge of the United States Circuit Court of Appeals, Eighth Circuit, on the 13th day of May, 1939.

Dixie Greyhound Lines, Inc. commenced this action on October 31, 1934, in the United States District Court for the Eastern District of Arkansas, Western Division, by filing its petition asking that the then Commissioner of Revenues of the State of Arkansas be enjoined from enforcing against it the provisions of said Acts, on the ground that said Acts, as the said Commissioner was attempting to apply them to the plaintiff, violated the Commerce Clause, Article 1, Section 8, Clause 3, and the Due Process Clause of the Fourteenth Amendment, of the Constitution of the United States. The District Court, after trial, dismissed

plaintiff's petition on the merits and sustained the validity of the statutes in question. 22 Fed. Supp. 985.

The Circuit Court of Appeals filed its decision reversing the judgment of the District Court on February 25, 1939, and in said decision held that said statutes violate the Commerce Clause; and that is the judgment appealed from in this appeal.

*New York* v. *Latrobe*, 279 U. S. 421, sustains the jurisdiction of the Supreme Court in this appeal.

The said Act 67 of the General Assembly of Arkansas of 1933, page 194, is the following:

"An Act to Better Enforce the Gasoline Tax, and for other Purposes.

Be It Enacted By The General Assembly Of the State of Arkansas:

Be It Enacted By The People of the State of Arkansas:

SECTION 1. On and after the passage of this Act it shall be a violation of the law for any person, co-partnership or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used as motor fuel in said truck or motor vehicles until the state tax thereon has been paid.

SECTION 2. Any person, co-partnership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100) Dollars. Each load carried into the state shall constitute a separate offense.

SECTION 3. All laws and parts of laws in conflict herewith are hereby repealed. It is ascertained that this Act is necessary to better enforce the gasoline collection laws and said Act being necessary for the immediate preservation of the public peace, health and

safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage.

Approved: March 2nd, 1933."

The pertinent parts of Act 11 of the Special Session of the General Assembly of Arkansas for 1934, page 28, are the following:

"A Bill for an Act to Be Entitled: 'An Act to Refund Highway and Toll Bridge Obligations of the State and Road Improvement District Obligations; to Provide for the Payment and/or Funding of Certificates Issued in Aid of Municipal Improvement Districts; to Provide for the Funding and/or Payment of Claims Against the State Highway Commission, and for Other Purposes.'

SECTION 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

'(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State.'

SECTION 25. Section 2 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

'SECTION 2. The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use when used in this State; double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable.' "

The Supreme Court of Arkansas in Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. (2d) 182, construed the

said Act 11 to impose a privilege tax for the use of the highways.

The Circuit Court of Appeals based its decision solely upon its opinion that the statutes in question violate the Commerce Clause. But out of an abundance of caution and for the purpose of meeting any possible contention that the decision can be sustained on a non-Federal ground, the following is stated:

Paragraph (c) of Section 1 of Act No. 63 of the General Assembly of Arkansas of 1931, page 171, approved February 25, 1931, which was amended and re-enacted by Section 22 of said Act 11, is the following:

> "(c) There is hereby levied a privilege tax of six cents (6¢) on each gallon of motor vehicle fuel sold in the State, or purchased for sale in the State for the purpose of propelling any motor vehicle on the public roads or highways in the State."

The said Act 67 of the General Assembly of 1933 has the effect of imposing the gasoline tax upon all gasoline in excess of twenty gallons brought into the State in the fuel tanks of any automobile or truck. Solely to fix the *amount* of the tax it is necessary to refer to Section 22 of said Act 11 of the Special Session of the General Assembly of Arkansas of 1934. A reference to said Section 22 and to the above quoted Paragraph (c) of Section 1 of Act No. 63 of 1931, which said Section 22 amended and reenacted, shows that it was the intent of the Legislature in said Act 67 of 1933 to impose the gasoline tax as fixed in *amount* by other statutes upon all gasoline in excess of twenty gallons brought into the state in the fuel tanks of any motor vehicle.

At the time Act 67 of 1933 was enacted, the amount of the tax was determined by said paragraph (c) of Section 1 of Act 63 of 1931. Said Act 67 of 1933 covers a special

part of a general subject and is therefore controlling as to all matters within its scope which, had it not been enacted, would have been governed by other statutes general in character covering the general subject.

This situation was not changed by the enactment in 1934 of said Section 22 of Act 11. "Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general." *Washington* v. *Miller*, 235 U. S. 422, at 428; *Kennedy* v. *United States*, 265 U. S. 344, at 346.

It is therefore evident that Act 67 of 1933 was intended by the Legislature to be enforced according to its specific terms and still remains in effect in all respects. Other laws, being now Section 22 of Act 11 of 1934, regulate only the *amount* of the tax.

The last paragraph of the decision of the Circuit Court of Appeals is the following:

> "The decree appealed from is reversed and the court below is directed to enter a decree in favor of the appellant, enjoining the appellee from enforcing the challenged tax against it with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states."

The effect of that is to prevent the Commissioner from enforcing said Act 67 of 1933. No law exists authorizing the Commissioner to require motor vehicle operators to pay a gasoline tax upon the precise quantity of gasoline used by them upon the State highways or to make and administer any regulation of that kind. The sole authority possessed by the Commissioner in the premises is that conferred by said Act 67 of 1933. That authorization is to require the tax upon all gasoline in the fuel tanks in

excess of twenty gallons. With respect to Dixie Greyhound Lines, Inc., it appears, from the evidence as to the manner in which the company handles its fuel supplies, and it is contended by the company, that there is always a substantial quantity of gasoline in its fuel tanks in excess of twenty gallons, while in Arkansas, which will be used in other States. Thus the court's decision effectively and completely prevents the Commissioner from requiring that the tax be paid on all fuel in the tanks of the busses in excess of twenty gallons; that is, from enforcing Act 67. And the court's decision is based entirely, as the opinion shows, upon its conclusion that Act 67 and part of Act 11 violate the Commerce Clause.

The question involved is a substantial one. The statutes in issue provide the only economical, practical, and effective means whereby the State may collect gasoline tax from many interstate motor carriers using its highways extensively. It is believed that *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, is authority, among other cases, to sustain the constitutional validity of the Arkansas Acts in question.

Respectfully submitted,

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FRANK PACE, JR.,
LOUIS TARLOWSKI,
*Attorneys for Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas.*

## EXHIBIT "A".

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

February 25, 1939.

No. 11284.

DIXIE GREYHOUND LINES, INC.,

vs.

McCARROLL, Com'r. of Revenue.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Thomas C. Trimble, Judge.

Suit in equity by the Dixie Greybound Lines, Inc., against Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, to enjoin application of a statute imposing a tax on all gasoline sold or used in the state of Arkansas and taxing all gasoline in excess of twenty gallons carried in the fuel tank of a motor vehicle. From a decree dismissing the bill of complaint, plaintiff appeals.

Reversed, with directions.

A. L. Heiskell, of Memphis, Tenn. (J. H. Shepherd, of Memphis, Tenn., A. L. Barber and E. A. Henry, both of Little Rock, Ark., Chandler, Shepherd, Owen & Heiskell, of Memphis, Tenn., and Barber & Henry, of Little Rock, Ark., on the brief), for appellant.

Louis Tarlowski, of Little Rock, Ark., Sp. Counsel for State of Arkansas (J. Hugh Wharton, of Little Rock, Ark., Atty. for State Revenue Department of Arkansas, on the brief), for appellee.

Before Gardner, Sanborn, and Van Valkenburgh, Circuit Judges.

SANBORN, Circuit Judge:

This is a suit in equity brought by the appellant, a Delaware corporation and a common carrier of passengers by

bus in interstate commerce, against the Commissioner of Revenue of the State of Arkansas, for an injunction against the proposed application to it of Act 11 of the Special Session of the General Assembly of Arkansas of 1934, p. 28, and Act 67 of the General Assembly of Arkansas of 1933, p. 194. Act 11 provides for the imposition of a tax of 6½ cents per gallon on all gasoline sold or used in the State of Arkansas. Act 67 prohibits any person from driving into the State any motor vehicle carrying more than 20 gallons of gasoline in its fuel tank, until the tax upon the excess has been paid. The court below denied an injunction and dismissed the bill of complaint.

The plaintiff in its bill alleged, and the evidence disclosed, that the Commissioner of Revenue was demanding that the appellant pay to the State, under threat of the penalties provided by law, 6½ cents on every gallon of gasoline in excess of 20 gallons which was brought into the State in the fuel tanks of its interstate busses; that the appellant was an interstate carrier by bus, and was duly qualified to operate in Arkansas and other states, and was subject to regulation as to its business and rates as such carrier; that it was a large user of gasoline, the cost of which was necessarily reflected in its rates and charges; that it was necessary to the proper and economical operation of its business that it have storage facilities for gasoline outside of the State of Arkansas; that the erection of such facilities within the State would be uneconomical and wasteful; that because of the distances traversed by its interstate busses in Arkansas and because of the normal gasoline consumption of such busses (5 miles per gallon), it was impractical, inconvenient and dangerous to have such busses enter Arkansas with 20 gallons or less of gasoline in their gas tanks and to rely upon refueling such busses at roadside filling stations in Arkansas; and that, as a result of the threats of the Commissioner, the appellant was placed in the position of having to adopt one of three alternatives: (1) restricting the amount of gasoline in the fuel tanks of interstate busses entering Arkansas to 20 gallons, thereby assuming the risk of road failures, stoppages and inconvenience, and necessitating refueling such busses at road-

side points in Arkansas, with consequent delay, fire hazard, and increased cost of operation; (2) setting up in Arkansas storage facilities for gasoline, at great expense; or (3) paying the tax of 6½ cents on every gallon in excess of 20 gallons brought in Arkansas in the fuel tanks of its interstate busses, regardless of whether such excess was used in the State or not.

The practical operation of the challenged tax as applied to the appellant's business can best be shown by considering its effect upon the appellant in connection with the busses which it operates between Memphis, Tennessee, and St. Louis, Missouri, a distance of 342.7 miles. The appellant maintains storage facilities for gasoline at both of these points, where water transportation is available and gasoline can be purchased in bulk at favorable prices. The appellant pays in Tennessee the taxes imposed by the laws of that State upon the gasoline which it stores in Memphis; it pays in Missouri the taxes on its gasoline stored in St. Louis. The bus leaving Memphis for St. Louis carries in its fuel tank enough gasoline to make the entire trip to St. Louis (approximately 70 gallons). It travels three miles in Tennessee before reaching the Arkansas line. It travels through Arkansas a distance of 77.9 miles, using approximately 16 gallons of gasoline in that State. The remainder of the gasoline in the fuel tank is consumed in traveling from the Arkansas line to St. Louis, a distance of 261.8 miles, upon the highways of Missouri. In returning from St. Louis to Memphis, the bus is fueled at St. Louis. In entering Arkansas it may or may not have in excess of 20 gallons in the fuel tank, depending, of course, upon how many gallons it started with from St. Louis. Assuming that the bus, in traveling each way, had 70 gallons in its fuel tank, it would pay to the State of Arkansas on its trip north a tax on approximately 69 gallons of gasoline, while upon its return it would pay no tax at all, although the wear and tear upon the highways of Arkansas would be the same on each trip.

The appellant does not now contend that the tax of which it complains may not be imposed by the State of Arkansas with respect to gasoline consumed or to be consumed upon

the highways of Arkansas, as compensation for the use of the highways, but it does contend that that State may not impose a tax upon gasoline which is carried in interstate commerce for use in Missouri or Tennessee, because that would constitute a direct and unreasonable burden upon interstate commerce.

(1, 2) The tax in suit is a tax imposed for highway purposes. This is so because the revenues derived from the tax are segregated for such purposes. Moreover, the Supreme Court of Arkansas, in Sparling *v.* Refunding Board, 189 Ark. 189, 71 S. W. 2d, 182, 186, has said that the Arkansas gasoline tax is a "privilege tax, a tax on the privilege of selling and using gasoline in this state, payable at the source * * * for substantially the only available use to which it may be put, for highway travel," and, page 186 of 71 S. W. 2d, "is not a property tax, but is a privilege tax for the use of the highways." Whether that court meant that it was a tax on all gasoline, however used, for the privilege extended to the user of the gasoline of making use of the highways of the State, or was a tax on all gasoline for the benefit of the highways, we think it is not necessary for us to determine. The decision of that court is controlling as to the meaning and extent of the requirements of the taxing act, Hicklin *v.* Coney, 290 U. S. 169, 172, 54 S. Ct. 142, 78 L. Ed. 247, and there can be no question that the tax is imposed for highway purposes.

Reduced to its lowest possible terms, the question for decision, we think, is whether the imposition of the tax upon gasoline carried for use in other states, in the fuel tank of a motor vehicle traveling in interstate commerce can be sustained.

That the tax is a direct burden on interstate commerce, cannot be controverted.

If it is to be sustained at all with respect to gasoline to be used in other states, it must be sustained upon the theory that the method employed for determining the amount of the tax constitutes a fair measure for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of

the highways of the State. In Interstate Transit, Inc., *v.* Lindsey, 283 U. S. 183, 186, 51 S. Ct. 380, 381, 75 L. Ed. 953, the Supreme Court said:

> "As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some ways, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. *v.* Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551, or by the express allocation of the proceeds of the tax to highway purposes as in Clark *v.* Poor, *supra* (274 U. S. 554, 47 S. Ct. 702, 71 L. Ed. 1199) or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick *v.* Maryland, 235 U. S. 610, 642, 35 S. Ct. 140, 59 L. Ed. 385; Interstate Busses Corp. *v.* Blodgett, 276 U. S. 245, 250-252, 48 S. Ct. 230, 72 L. Ed. 551. Compare Interstate Busses Corp. *v.* Holyoke Street R., 273 U. S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530. But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity."

While we can understand how the use of state highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one state can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another state.

We think this case is ruled by Interstate Transit, Inc. *v.* Lindsey, *supra*. There the court had under consideration an act of Tennessee which imposed a tax upon persons operating interstate motor busses on the highways of that State, which tax was graduated according to the passenger-carrying capacity of the busses. The court demonstrated that the tax was not imposed for highway purposes or as com-

pensation for the use of the highways, but was imposed for the privilege of doing business in Tennessee. The court then considered whether the passenger-carrying capacity of a bus was a reasonable measure for determining compensation for use of the highways. It said, in this connection, page 190 of 283 U. S., page 382 of 51 S. Ct.:

> "It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare Gundling *v.* Chicago, 177 U. S. 183, 189, 20 S. Ct. 633, 44 L. Ed. 725. But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. Clark *v.* Poor, *supra.* In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

(3) The rule that the measure of the compensation exacted by a state from an interstate carrier for the use of

its highways must have some reasonable relation to the use which that carrier makes of the highways, has not been modified or overruled. It is true that in Hicklin *v.* Coney, 290 U. S. 169, 173, 54 S. Ct. 142, 144, 78 L. Ed. 247, the Supreme Court said:

> "Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the 'carrying capacity' of the vehicles. The state court held that the fees 'are collected, as provided for by section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use.' The statute provides for the segregation, for this purpose, of the moneys collected. See Clark *v.* Poor, 274 U. S. 554, 555-557, 47 S. Ct. 702, 71 L. Ed. 1199. In this view the fees are not open to the objection raised in Interstate Transit, Inc., *v.* Lindsey, 283 U. S. 183, 186, 188, 51 S. Ct. 380, 75 L. Ed. 953. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this reason that the authority of the state to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. Morris *v.* Duby, 274 U. S. 135, 143, 47 S. Ct. 548, 71 L. Ed. 966; Sproles *v.* Binford, 286 U. S. 374, 388, 389, 52 S. Ct. 581, 76 L. Ed. 1167. As the state may establish such regulations directly, the state may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose. Clark *v.* Poor, *supra.*"

This language we do not regard as modifying Interstate Transit, Inc., *v.* Lindsey, *supra*, which was cited with approval in Aero Mayflower Transit Co. *v.* Georgia Commission, 295 U. S. 285, 289, 55 S. Ct. 709, 79 L. Ed. 1439; Morf *v.* Bingaman, 298 U. S. 407, 410, 56 S. Ct. 756, 80 L. Ed. 1245; Ingels *v.* Morf, 300 U. S. 290, 294, 57 S. Ct. 439, 81 L. Ed. 653.

(4) Since we can perceive no reasonable relation between the amount of gasoline carried through Arkansas in the fuel

tank of an interstate bus for use in states other than Arkansas and the use which that bus makes of the highways of Arkansas, we think that the State was powerless to include such gasoline in measuring the compensation to be paid by the appellant for the use of the highways of the State.

(5) There is, we think, another vice which inheres in this taxing statute as sought to be applied by the taxing authorities. It imposes a direct burden not only upon the interstate commerce done by the appellant in the State of Arkansas, but also upon the interstate commerce which it carries on in other states. By taxing the means whereby a bus makes a through trip from Memphis to St. Louis, the State taxes gasoline which is merely transported through Arkansas for use in interstate commerce in Missouri. The weight of the gasoline is negligible and by no stretch of the imagination can it be said to increase the wear and tear upon the highways of Arkansas. That portion of the gasoline in the fuel tanks of these interstate busses which is intended for use and is used in states other than Arkansas is the medium whereby the appellant carries on interstate commerce in those states. To tax that medium is to directly and unjustifiably burden that commerce. Helson *et al. v.* Kentucky, 279 U. S. 245, 252, 49 S. Ct. 279, 73 L. Ed. 683.

(6) Another consideration which militates against sustaining the sort of tax which Arkansas seeks to exact from the appellant here is that that would open the door to the cumulative taxation of the same gasoline by all states through which an interstate motor vehicle passes. If it were possible for a bus starting from New York City for Los Angeles, California, to carry enough fuel for the entire trip, it might be subjected to such a tax as is here complained of upon the contents of its fuel tank at the borders of each state through which it passed. It is our understanding that, while a state may require an interstate carrier operating within its borders to bear its proportionate share of the burden of government, it may not tax that part of the commerce which is done by that carrier in other states. Fargo *v.* Michigan, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888; West-

ern Live Stock *v.* Bureau of Revenue, 303 U. S. 250, 255-257, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944.

The decree appealed from is reversed and the court below is directed to enter a decree in favor of the appellant, enjoining the appellee from enforcing the challenged tax against it with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 13, 1939.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

No. 138

Z. M. McCARROLL, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS ..... *Appellant,*

v.

DIXIE GREYHOUND LINES, INC. ..... *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## BRIEF OF APPELLANT

With Appendix

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IN THE

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF OF APPELLANT

With Appendix

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### Opinions Below

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 101 F. 2d 572 (R. 67). The opinion of the United States District Court for the Eastern District of Arkansas is reported in 22 F. Supp. 985 (R. 28).

### STATEMENT AS TO JURISDICTION

Statement as to jurisdiction was filed as required by Rule 12, and probable jurisdiction was noted on October 9, 1939.

This is an appeal under Section 240 (b), Judicial Code, 28 U. S. C. 347 (b), from a final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, holding certain statutes of the State of Arkansas to be invalid because repugnant to the Commerce Clause (Art. I, Sec. 8, cl. 3) of the Constitution of the United States. The plaintiff in the District Court, appellee here, sued to enjoin enforcement of such statutes, alleging conflict with the Commerce Clause and an amount in controversy exceeding $3,000 (R. 1). Neither temporary restraining order nor temporary injunction were sought (R. 23-24). The District Court, one judge sitting, held the statutes valid and dismissed the complaint, 22 F. Supp. 985 (R. 28). The Circuit Court of Appeals reversed the District Court, holding the statutes invalid under the Commerce Clause, 101 F. 2d 572 (R. 67). This action was begun in the District Court on October 31, 1934 (R. 1), hence the Act of August 21, 1937, 50 Stat. 738, does not apply, *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 586. The amount in controversy exceeds $3,000, in that the evidence shows that if the statutes are valid appellee will, by reason thereof, be required to pay to the state in the regular and usual operation of its busses more than $3,000 annually in gasoline taxes. *Clark* v. *Paul Gray, Inc., supra.* Recital of the facts showing such jurisdictional amount is an integral and necessary part of the general statement of the case, so to avoid repetition that recital will be made in such statement.

The last paragraph of the decision of the Circuit Court of Appeals is the following:

> "The decree appealed from is reversed and the court below is directed to enter a decree in favor of the appellant, enjoining the appellee from enforcing the

challenged tax against it with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states."

The effect of that is to prevent appellant from enforcing the statutes in question, at least as to appellee. These statutes require appellant to collect the state gasoline tax on all gasoline in excess of twenty gallons brought into the state in the fuel tanks of motor vehicles. The evidence shows that there is always a substantial quantity of gasoline in excess of twenty gallons in the fuel tanks of appellee's busses, while in Arkansas, which will be used in other states (R. 49-50). The command of the statutes is to collect the tax on all such excess. Appellant is thus restrained from enforcing the law as the legislature enacted it. The very least that can be said of the court's decision is that it held the statutes partially unconstitutional, but the actual result is to invalidate them entirely and render them unenforceable.

## STATEMENT OF THE CASE

### The Statutes in Question

The statutes in question are Act 67 of the Acts of the 49th General Assembly of Arkansas of 1933, Regular Session, page 194; and part of Act 11 of the Acts of the Second Extraordinary Session of the 49th General Assembly of Arkansas of 1934, page 28 (Appendix "A").

Act 67 of 1933 is the following:

"An Act to Better Enforce the Gasoline Tax, and for other Purposes.

"Be It Enacted by the General Assembly of the State of Arkansas:

"Be It Enacted by the People of the State of Arkansas:

"Section 1. On and after the passage of this Act it shall be a violation of the law for any person, co-partnership or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used as motor fuel in said truck or motor vehicles until the state tax thereon has been paid.

"Section 2. Any person, co-partuership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100) dollars. Each load carried into the state shall constitute a separate offense.

"Section 3. All laws and parts of laws in conflict herewith are hereby repealed. It is ascertained

that this Act is necessary to better enforce the gasoline collection laws and said Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage.

"Approved: March 2nd, 1933."

Act No. 11 (Appendix "A") fixes the amount of the tax at six and one-half cents per gallon.

Thus the combined effect of the two statutes is to require a person driving a motor vehicle into the state to pay the tax of six and one-half cents per gallon on all gasoline in excess of twenty gallons in the fuel tanks of the vehicle.

## The Evidence

The evidence consists of the affidavits, admitted by stipulation, of two officials of appellee (R. 44). Certain allegations of appellee's complaint which were admitted by appellant's answer will also be referred to here.

Appellee is a corporation engaged as a common carrier of passengers for hire by motor bus in interstate and intrastate commerce, and has appropriate authority from the Interstate Commerce Commission and various state regulatory commissions. It operates in and through various states, including Tennessee, Arkansas and Missouri (R. 45). The routes it follows in and through Arkansas are shown in the upper right-hand corner of the map of the north-

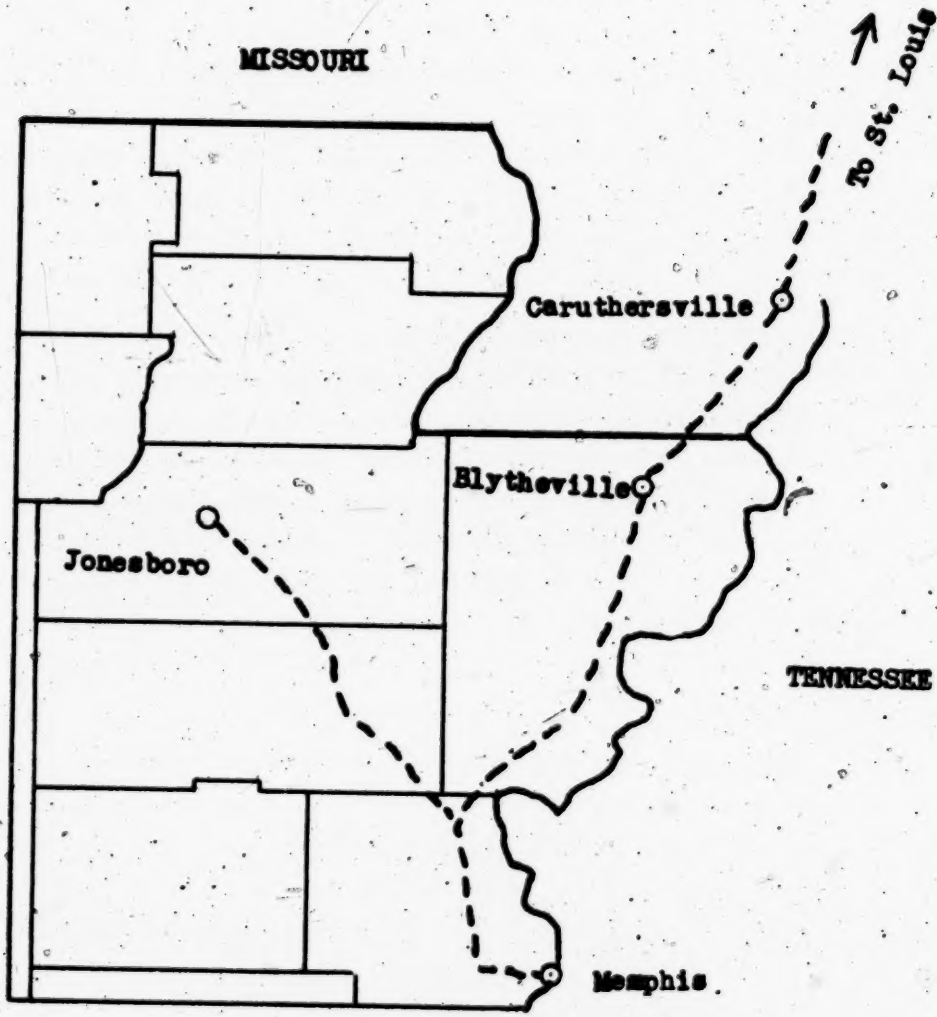
eastern part of Arkansas shown on opposite page, and its detailed operations over such routes are the following; numbered only for convenience in reference:

(1) Between Memphis, Tennessee, and St. Louis, Missouri. This operation begins at Memphis, crosses the Mississippi River into Arkansas, parallels the course of the river north through Blytheville, Arkansas, to the northern boundary of Arkansas, and then proceeds in a northerly direction (diverting several miles to enter Caruthersville, Missouri) to St. Louis. Three miles are in Tennessee, 77.9 miles in Arkansas, and 261.8 miles in Missouri, a total of 342.7 miles. The route follows U. S. Highway No. 70 in Memphis, Tennessee, and for a few miles westward in Arkansas to West Memphis, and thence northerly on U. S. Highway No. 61 to St. Louis (R. 46). Three scheduled trips are made daily in each direction (R. 51).

(2) Between Memphis, Tennessee, and Blytheville, Arkansas, over the same highways. Three miles are in Tennessee, and 71.4 miles are in Arkansas (R. 46). Two scheduled trips are made daily in each direction (R. 51).

(3) Between Memphis, Tennessee, and Caruthersville, Missouri, over the same highways. Three miles are in Tennessee and 77.9 miles are in Arkansas. One scheduled trip is made daily in each direction (R. 15, 51, 46). Caruthersville is 105.2 miles from Memphis (R. 50).

(4) Between Memphis, Tennessee, and Jonesboro, Arkansas. This operation follows the routes of the first three operations on U. S. Highways 70 and 61 to the junction point at Turrell, Arkansas, and then follows U. S. Highway 63 northwest to Jonesboro, Arkansas. Three miles are in Tennessee and 70 miles in Arkansas (R. 46).




PART OF NORTHEAST ARKANSAS

- - - - indicates bus routes



Two scheduled trips are made daily in each direction (R. 51).

In each of these operations appellee carries both interstate and intrastate passengers in the same busses. Interstate passengers very greatly predominate in number and percentage of ticket sales. All of the cities and towns on these routes, in addition to those named above, are served (R. 47).

The busses average approximately five miles for each gallon of gasoline consumed (R. 49, 25). On the Memphis to Jonesboro, Arkansas, busses; on the Memphis to Blytheville, Arkansas, busses; and on the Memphis to Caruthersville, Missouri, busses, appellee puts enough gasoline in the fuel tanks at Memphis to enable the busses to travel from Memphis to such points and return to Memphis, with a reasonable margin of safety. The Memphis to St. Louis busses are fueled only at Memphis and St. Louis (R. 49, 50).

Appellee is a very large user of gasoline, using 1,259,401 gallons in 1935. The cost of such gasoline at the refinery and the transportation charges and taxes thereon constitute one of the principal elements in the total cost of furnishing transportation (R. 47).

Appellee's witnesses further testified by such affidavits that it has been found, through years of experience, that the only economical, safe, practicable and reliable method of obtaining and handling gasoline requires the maintenance by the operating company of storage facilities capable of storing gasoline in large quantities. Such facilities must be large enough to permit the purchase and storage of gasoline in carload or barge load quantities be-

cause gasoline may be purchased in such quantities direct from the producers at lower cost than in smaller quantities. Such storage facilities should not be more numerous than absolutely necessary in order to save investment and expense. Such storage facilities should be located at strategic points with reference to the routes traversed by the motor busses and where water transportation is available, not only by reason of the fact that water transportation is cheaper in itself, but also because the availability of water competition tends to reduce competitive railroad rates. It is also necessary that appellee exercise supervision over the quality and grade of gasoline used by it in order to control cost of operation. It is impracticable from an accounting and operating point of view to permit the casual purchase of gasoline for the use of a bus in the course of a journey. Variation from such proper operating practices increases the cost of fuel and causes delays which increase the cost of transportation to the public, and injures appellee by causing inferior service. Filling fuel tanks at roadside filling stations constitute a fire risk. There is no point within the State of Arkansas on any of the routes traversed by appellee which offers advantages for the purchase and storage of gasoline or where the acquisition or maintenance of storage facilities would not prove to be a useless expense to the company. Appellee pays to the State of Tennessee a tax of 7c per gallon and an additional inspection fee of four mills per gallon on all gasoline placed by it in storage in its facilities in Memphis, Tennessee; whether such gasoline is used within the State of Tennessee or not, the fact of storage in that state making such gasoline liable for the tax. Appellee also pays to the State of Missouri a tax of 3c per gallon on all gasoline placed by it in storage

in its facilities in that state, whether such gasoline is used in the State of Missouri or not. Every gallon of gasoline which is carried into the State of Arkansas in the tanks of a motor bus owned by appellee has been taxed by, and the tax paid to, either the states of Tennessee or Missouri (R. 47-50).

Appellee's witnesses further testified that the interstate rates of appellee are under regulation of the Interstate Commerce Commission and its intrastate rates are under regulation of the various public utilities regulatory boards of the various states, the intrastate rates in Arkansas being under the supervision of the Arkansas Corporation Commission. In practice, rates are proposed by appellee in the form of filed tariffs, the regulatory boards having the right to suspend such rates if they so desire (R. 52-53).

## JURISDICTIONAL AMOUNT

A bus which moves from Memphis to St. Louis, on the route designated above as (1), travels 339.7 miles after crossing the Tennessee Arkansas boundary (R. 46). It must therefore have in its fuel tanks at such crossing at least 68 gallons of gasoline (339.7 ÷ 5 = 68). Of course it has more as a reserve supply. Considering only this 68 gallons, however, there are in the fuel tanks of each Memphis-St. Louis bus as it enters Arkansas at least 48 gallons of gasoline subject to the tax of 6.5 cents under the statutes in issue here, a total of $3.12. Three trips are made daily, making a total of $9.36 tax for the daily one-way operation from Memphis to St. Louis. This alone is sufficient to establish the necessary jurisdictional amount as more than $3,000 "would normally be collected during

the period of the litigation," *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589. The usual course of a suit from District Court through the Circuit Court of Appeals and the Supreme Court could hardly require less than a year. This amount is increased, however, by the other operations. On the return trip from St. Louis to Memphis, as the bus has only 80.9 miles to travel after crossing the Missouri-Arkansas boundary, it may not be carrying more than 20 gallons of gasoline as it can make the trip on 17 gallons; hence for jurisdictional purposes that will not be considered.

In the operations designated above as (2), (3), and (4), the busses are fueled only at Memphis and make round trips from and to that point (R. 49, 50). The busses carry a reserve supply (R. 50) but for present purposes we need not estimate its amount. In operation (2) a bus travels 71.4 miles from the Tennessee-Arkansas line to Blytheville, Arkansas, and return, and 3 miles in Memphis, a total of 145.8 miles after entering Arkansas. Two trips are made daily, 291.6 miles, requiring 58 gallons of gasoline, 18 gallons being subject to the tax, which is $1.17. In operation (3) a bus travels 207.4 miles for the round trip after entering Arkansas. That requires 40 gallons of gasoline of which 20 is subject to the tax totaling $1.30. Only one trip is made. In operation (4) a bus travels a round trip of 143 miles after entering Arkansas, requiring 29 gallons of gasoline. Two trips are made, making 18 gallons subject to the tax of $1.17.

That makes a total daily tax from all four operations of $13.00, computing only the minimum amount of gasoline necessary to propel the vehicles the required mileage, and without allowing for any reserve supply.

## ASSIGNMENT OF ERRORS

1.

The court erred in holding that Act 67 of the General Assembly of Arkansas of 1933, page 194, violates the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States.

2.

The court erred in holding that said Act 67 of the Acts of the General Assembly of Arkansas of 1933, page 194, and Section 22 of Act 11 of the Second Extraordinary Session of the General Assembly of Arkansas of 1934, page 28, violate the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States, or the Fourteenth Amendment to the Constitution.

3.

The court erred in holding said acts unconstitutional, because the evidence shows (a) that on some of the company's routes the busses can be and are operated during the entire time while in Arkansas on less than twenty gallons of gasoline, and (b) that on all of the routes said busses can be so operated that all of the gasoline in the fuel tanks in excess of twenty gallons at the time the busses enter Arkansas will be consumed in Arkansas.

4.

The court erred in holding that inconvenience which may be suffered by Dixie Greyhound Lines, Inc., in complying with said acts affords a sufficient ground for declaring said acts unconstitutional.

5.

The court erred in holding said acts unconstitutional, because said acts afford a necessary and practical and valid means of collecting the gasoline tax from interstate motor vehicle operators using the state's highways.

6.

The court erred in holding said acts unconstitutional, because in their practical operation they do not necessarily require a motor vehicle operator to pay a tax upon gasoline he uses in another state.

7.

The court erred in holding that because of the plan of carrying on its business adopted by Dixie Greyhound Lines, Inc., said acts are unconstitutional.

8.

The court erred in holding said acts unconstitutional on the ground that they impose a tax upon gasoline used in other states.

9.

The court erred in holding that said acts impose an unconstitutional burden upon interstate commerce.

10.

The court erred in holding that the facts that the acts may require a motor vehicle operator to pay to Arkansas the Arkansas tax upon gasoline which such operator uses in another state renders the acts unconstitutional.

## SUMMARY OF ARGUMENT

### I.

The tax required by the statutes in question is levied for the privilege of using the highways. The Circuit Court of Appeals so held as its own conclusion in following the decision of the Supreme Court of Arkansas in *Sparling v. Refunding Board*, 189 Ark. 189, 71 S. W. 2d 182. The decision of the Supreme Court of Arkansas is controlling.

### II.

Act 67 of 1933 is fair and reasonable. It provides a necessary means of enforcing the gasoline tax; and the means used are within the State's constitutional power.

A. It imposes no burden on appellee even while appellee is conducting its operations in the manner appellee deems most convenient.

B. The inconvenience and expense shown by the evidence to be occasioned appellee by the enforcement of Act 67 do not amount to an unconstitutional burden on appellee. The convenience of the individual using the highways as his place of business must yield to the power of the State to select its own methods for collecting compensation for the use of its highways.

C. Act 67 can be sustained independently of other grounds as an easily administered aid in the enforcement of the State gasoline tax even though it may work a hardship in some cases. It effects a "reasonable margin to insure effective enforcement."

### III.

The reasons assigned by the Circuit Court of Appeals for its decision are insufficient to overthrow Act 67 of 1933.

A. Act 67 does not impose a tax upon gasoline which is carried through Arkansas for use in other States.

B. The Court misunderstood and misapplied *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183.

C. Act 67 does not burden commerce carried on in other States.

D. Act 67 does not open the door to the principle of the cumulative taxation of the same interest by more than one State.

## IV.

*Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, is direct authority to sustain Act 67 of 1933.

## ARGUMENT

### I.

### THE TAX REQUIRED BY THE STATUTES IN QUESTION IS LEVIED FOR THE PRIVILEGE OF USING THE HIGHWAYS.

The Circuit Court of Appeals held that the tax required by the two statutes is imposed as compensation for the privilege of using the highways. This appears to be its own independent conclusion, but it also followed the opinion of the Supreme Court of Arkansas in *Sparling* v. *Refunding Board*, 189 Ark. 189, 71 S. W. 2d 182, which so held as to Act 11 of 1934.

In the courts below appellee vigorously insisted (1) that the Supreme Court of Arkansas did not in *Sparling* v. *Refunding Board* hold that Act 11 of 1934 imposes a tax for the privilege of using the highways, and (2) that even if it did so hold, that decision is not binding on the Federal Courts.[1] Because of appellee's position we give some attention to the point here.

We submit that it is altogether obvious: (1) that Act 11 of 1934 and Act 67 of 1933, either separately or together impose a tax for the privilege of using the highways; (2) that this question was clearly decided and settled by the decision of the Supreme Court of Arkansas in *Sparling* v. *Refunding Board*, *supra*, and that the Court there held that Act 11 of 1934, imposes a tax for the privilege of using the highways; and (3) that the decision of

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[1] Appellee did not seek a review of that part of the decision of the Circuit Court of Appeals holding that the tax is imposed for the privilege of using the highways. Compare *Alexander* v. *Cosden Co.*, 290 U. S. 484, 487; *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 184.

the Supreme Court of Arkansas will be accepted as final by this Court.

In *Sparling* v. *Refunding Board, supra,* certain parties using gasoline for other purposes than propelling motor vehicles sought (1) to have Act 11 of 1934 construed to exempt them from the tax, or (2) if Act 11 should not be so construed, to have it declared violative of the Arkansas Constitution. The following is the substance of the Court's opinion on this point:

Prior to 1934, one using gasoline for other purposes than propelling motor vehicles on the public highways could obtain a refund of the tax paid, but Act 11 discontinued such refunds. The refunds had reached the excessive proportions of $553,596.36 out of a total tax of $6,542,024.79 in 1933. Perhaps from 50 to 90 per cent of the refunds were fraudulent. The purpose of the legislature in doing away with the refunds was to improve the collection of the gasoline tax by eliminating the principal means of evading it. *The tax is imposed for the privilege of using the highways; the imposition of the tax upon non-highway uses does not change the character of the tax but is only for the purpose of facilitating the collection of the tax.*

Summarizing its position, the Court said in the last paragraph of its opinion:

> "Let it be definitely understood that the tax imposed is not a property tax, but it is a privilege tax for the use of the highways, and that the legislature has declared the public policy of the State to be to tax all gasoline sold or used in this State for such purpose in order to prevent fraud and imposition on the State in the sale or use of a comparatively negligible quantity for other purposes."

That part of the Court's opinion which holds that a gasoline tax for the privilege of using the highways can be imposed upon users for non-highway purposes as a means of preventing evasion appears to be supported by decisions of this Court.[2] But if that particular conclusion were erroneous, and if the question were now before this Court, such error would not in any way militate against the Arkansas court's holding that the tax is imposed for the privilege of using the highways. The only result of the error would be to release from the tax users of gasoline for non-highway purposes. This is self-evident and likewise appears from the dissenting opinion in *Sparling* v. *Refunding Board, supra.* Furthermore, if such question were before this Court appellee, whose use of gasoline is for highway purposes, would have no standing to raise it. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595-596.

The express decision of the Supreme Court of Arkansas that the tax imposed by Act 11 of 1934 is a charge for the privilege of using the highways will be accepted by this court as final. *Hicklin* v. *Coney*, 290 U. S. 169, 172; *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, 628. In the latter case a New Mexico statute made gasoline brought into the State in the fuel tanks of motor vehicles subject to the gasoline tax, but no exemption of any amount was allowed. This Court said:

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[2] *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201; *New York* v. *Hesterberg*, 211 U. S. 31, 40; *Milliken* v. *United States*, 283 U. S. 15, 24-25; *Burnet* v. *Wells*, 289 U. S. 670, 678; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 426; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 341; *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334, 353; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 500.

> "The case turns upon the question of whether the pertinent statutory provisions exact a charge as compensation to the State for the use of its highways, or impose an excise tax for the use of an instrumentality of interstate commerce. If the former, the tax should be sustained; if the latter, it clearly contravenes the commerce clause, and must be held bad."

This Court then found that the Supreme Court of New Mexico had held the tax not to be one for the privilege of using the highways but to be an excise on the general use of gasoline. The Court held that it was bound by this construction.

In the instant case there is the same main question, the Arkansas statute being more favorable to the taxpayer, however, in allowing the 20 gallons exemption; and the Supreme Court of Arkansas has held the tax to be imposed for the privilege of using the highways. It is submitted that the tax is levied for the privilege of using the highways and that *Bingaman v. Golden Eagle Western Lines, supra,* indicates that it is valid.

## II.

## ACT 67 OF 1933 IS FAIR AND REASONABLE. IT PROVIDES A NECESSARY MEANS OF ENFORCING THE GASOLINE TAX; AND THE MEANS USED ARE WITHIN THE STATE'S CONSTITUTIONAL POWER.

A. The purpose of the statutes and the practical necessity for them are plain. The State of Arkansas has a large system of paved roads, including those used by appellee. It is evident from a reading of Act 11 of the Special Session of 1934 (Appendix "A") that the gasoline

tax is of vital necessity in paying for and maintaining them, including retirement of highway bonds. The terms of Act 11 show that it is a revised continuation of legislation begun in 1927 and before; and the various successive legislative acts all have been directed, in part, to better collection of the gasoline tax. All of the proceeds of the tax are pledged to use for highway purposes. (Secs. 2, 23 (e).) The legislature pledges to maintain the annual revenue from gasoline taxes and motor vehicle license fees at $8,537,000.00. (Sec. 48.)

The necessity for Act 67 of 1933 in a plan of highway financing so dependent upon the gasoline tax is apparent. Appellee's arguments only more forcibly demonstrate the propriety of the tax. Appellee operates a regular daily total of 1,188.8 bus miles upon the Arkansas highways,[3] and unless Act 67 can be enforced against it appellee will pay no gasoline tax to the State. Were there no improved highways appellee could not operate its busses 1,188.8 miles daily in the State, yet appellee objects to paying to the State whose highways it uses the gasoline tax which makes such highways possible.

Appellee's objection to that, and its principal objection to the tax, is that the form of Act 67 is such that compliance with it is so burdensome that the Act violates the Commerce Clause. Appellee's entire showing of burdensomeness is confined to allegation and proof that it is cheaper and more convenient to store in Memphis and St. Louis, gasoline to be used in operating busses through

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[3] Route (1), 3 trips daily each way over 77.9 miles = 467.4 miles. Route (2), 2 trips daily each way over 71.4 miles = 285.6 miles. Route (3), 1 trip daily each way over 77.9 miles = 155.8 miles. Route (4), 2 trips daily each way over 70 miles = 280 miles. Total, 1,188.8 miles (R. 46, 47, 51).

Arkansas, than to store such gasoline in Arkansas or elsewhere; and that Act 67 burdens the storage of gasoline in Memphis and St. Louis.

It is submitted that Act 67 is valid on its face and that appellee's claims and the evidence adduced to support them are of no materiality. It seems evident as a matter of law that the exemption of twenty gallons provides a sufficient practical, working margin to enable a motor vehicle operator to avoid payment of an excessive tax to Arkansas, and to further avoid, by the exercise of ordinary care, duplication in payment of the tax to other States. And certainly that is all that the taxpayer is entitled to demand, particularly where he uses the improved Arkansas highways as a place to conduct his business.

However, we will now submit, by an analysis of appellee's own evidence, that such evidence of itself establishes the validity of the act. As above stated, we think the act is valid on its face and that an examination as to its effect upon particular individuals is not relevant. But since appellee's evidence does illustrate, by the effect of the Act upon appellee, that the Act does operate fairly, we make a brief analysis of it here. And that analysis may have some value, as a laboratory experiment, in demonstrating, as is the purpose of elementary laboratory experiments, the correctness of a well known general truth.

As has been stated, appellee operates a regular daily total of 1,188.8 bus miles in Arkansas. At five miles per gallon this requires 237.76 gallons of gasoline, upon which the Arkansas tax at 6.5 cents would be $15.45.

It cannot be maintained that appellee cannot be required to pay the amount of gasoline tax needed for the

actual mileage of its operations on the Arkansas highways. However, as has been shown above in the discussion of the jurisdictional amount, appellee can carry on its present plan of operations, maintaining gasoline supply only at Memphis and St. Louis, and otherwise conducting its business as it likes, and still comply with Act 67 and pay a minimum of $13.00 in daily gasoline taxes. As has been made clear, this figure of $13.00 does not allow for a reserve supply, but is based upon the mathematically required amount of gasoline, at 5 miles per gallon, needed to operate the busses from the time they enter Arkansas until they arrive at either Memphis or St. Louis. But at that it is $2.45 less than the tax upon the gasoline required for the actual daily bus mileage in Arkansas.

We shall now analyze further the effect of Act 67 upon appellee while appellee is carrying on its present method of operation. Our purpose is to show: (1) the actual amount of gasoline consumed on the portions of each route which lie entirely in Arkansas, and the tax which would be required upon such gasoline; (2) the amount of tax which Act 67 would require appellee to pay on each route under appellee's present operating plan, assuming a certain reserve supply to be carried; and (3) the comparison of the amounts of the tax obtained by such computations.

As has been shown above, the operation designated for reference as (1), Memphis to St. Louis and return, has 3 miles in Tennessee, 77.9 miles in Arkansas, and 261.8 miles in Missouri; total, 342.7 miles (R. 46). If a northbound bus leaves Memphis with 78 gallons of gasoline it will have 10 left on arrival at St. Louis. The tax will be paid on 58 gallons when entering Arkansas, $3.77. A south-

bound bus leaving St. Louis with 78 gallons will travel 261.8 consuming 52.4 gallons, before reaching Arkansas. On entering Arkansas 25.6 gallons will be left in the tank and the tax will be paid on 5.6 gallons, 37 cents. Thus the total tax cost for one round trip, carrying ten gallons reserve each way, will be $4.14. The round-trip mileage wholly in Arkansas is 155.8, requiring 31.6 gallons of gasoline on which the tax would be $2.06. This leaves a "loss" of $2.08 for appellee, but as will be shown this "loss" is made up by "gains" on the other routes.

In operation (2), Memphis, Tennessee, to Blytheville, Arkansas, and return, a bus is fueled only at Memphis. After crossing the Arkansas line it travels 71.4 miles to Blytheville, returns back to the line, and travels 3 miles in Memphis to destination. Of this route 142.8 miles are in Arkansas, requiring 28.56 gallons of gasoline on which the tax would be $1.86. Only 6 miles of the round trip are not in Arkansas (R. 46, 51). Appellee could start the trip with 35 gallons, and could complete it with a reserve supply of 5 gallons left. Fifteen gallons would be taxed on entering Arkansas, for 98 cents. Thus, as appellee now conducts its business it can comply with Act 67 and save 88 cents in taxes on each round trip on this route over the value of the tax on the amount of the gasoline it actually uses on the Arkansas highways.

On operation (3) it is 210.4 miles from Memphis to Caruthersville, Missouri, and return. Of this 155.8 miles are in Arkansas, requiring a gasoline tax of $2.06 (R. 15, 46, 50, 51). The total amount of gasoline required for the round trip is 42 gallons. Appellee could enter Arkansas

with 50 gallons and pay a tax of $1.95 on 30 gallons for the round trip, thus saving 11 cents in taxes.

On operation (4) it is 146 miles from Memphis to Jonesboro, Arkansas, and return, of which 140 miles are in Arkansas requiring a tax of $1.82 (R. 46, 51). Twenty-nine gallons of gasoline are required for the round trip. Appellee could enter Arkansas with 35 gallons and pay a tax on 15 gallons of 98 cents, with a saving of 84 cents.

Summarizing these computations, we have the following for one round trip on each of appellee's routes:

| Route | Amount of tax which would be required on gasoline actually consumed in Arkansas. | Amount of tax which would be paid by appellee under its present operating plan while carrying the assumed reserve gasoline supply. |
|---|---|---|
| (1) | $2.06 | $4.14 |
| (2) | 1.86 | .98 |
| (3) | 2.06 | 1.95 |
| (4) | 1.82 | .98 |
| Total | $7.80 | $8.05 |

These computations would be changed by assuming a smaller or larger reserve supply. But they demonstrate that Act 67 works no hardship on appellee or any other operator. It is to be noted particularly that the discrepancy with respect to route (1) is caused by the fact that appellee runs a bus from Memphis to St. Louis, 342.7 miles, without refueling. If appellee changed its refueling plan it could operate without any "loss." If it now refueled at Caruthersville, Missouri, as it did when this action was begun (R. 6, 14, 49), it would be the gainer. We shall devote some attention to that point later herein.

B. We have been justifying Act 67 by showing that it imposes no hardship upon appellee while appellee is con-

ducting its operations as it desires, with gasoline storage facilities only at Memphis and St. Louis. But it is of course obvious that it is not necessary to go to that extent to sustain the Act. The convenience of the individual using the highways as his place of business must yield to the power of the State to select its own methods for collecting compensation for the use of its highways. *Aero-Mayflower Transit Co. v. Georgia Public Service Comm.*, 295 U. S. 285, 289; *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 72; *Sproles* v. *Binford*, 286 U. S. 374, 388-389, 390, 391. The *Aero-Mayflower* case presents a close analogy to our own. The statute in issue there required a flat fee of $25.00 per year for each vehicle operated by a contract carrier. In the lower court, as shown by the opinion of the Supreme Court of Georgia (179 Ga. 431, 176 S. E. 487), plaintiff, a non-resident, complained that during a year it was required to operate 60 trucks into the State of Georgia wholly in interstate commerce, but that each truck made only occasional and infrequent trips into the State, and that the cost of licensing the sixty trucks at $25 each, $1,500, for the actual amount of highway use plaintiff obtained, was an excessive burden on interstate commerce. Answering that the Supreme Court of Georgia said (179 Ga., p. 442, 176 S. E. p. 493):

> "The fact that a flat rate is charged for each motor vehicle does not, without more, furnish ground for a charge of discrimination, nor does it furnish ground of such charge as applied to the plaintiff as a private carrier exclusively in interstate commerce, operating many motor vehicles which interchangeably come into this State at intervals. A motor vehicle provided with the prescribed license could operate over the highways of the State continuously, *and the plaintiff should adjust the movements of its motor ve-*

*hicles to the requirements of the law.*" (Emphasis supplied.)

This court affirmed the judgment of the Supreme Court of Georgia upholding the statute, and said:

> "The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. *There would be administrative difficulties in collecting on that basis.* The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. Cf. *Clark* v. *Poor*, 274 U. S. 554, and *Hicklin* v. *Coney*, 290 U. S. 169, *supra.*" (Emphasis supplied.)

In *Carley & Hamilton* v. *Snook*, *supra*, this Court said (281 U. S., p. 72):

> "A corollary of this contention is that although the fees are not *per se* disproportionate to the privilege of operating over all the highways of the State, appellants are nevertheless entitled to receive licenses limiting the operation of their motor cars to the few highways which they wish to use, upon the payment of correspondingly reduced fees. But no constitutional principle is suggested, and we know of none which would enable a licensee thus to regulate the extent of the privilege granted or to assail an otherwise valid tax upon it merely because a reduction of the privilege and the tax would better suit his convenience or his pocketbook."

That case involved intrastate commerce, but that difference is not material, *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 184-191; and see *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 373,

where *Carley & Hamilton* v. *Snook* is cited in a case involving interstate commerce.

Appellee could easily "adjust the movements of its motor vehicles to the requirements of the law." At the time this action was begun appellee had gasoline storage facilities at Caruthersville, Missouri, which is on the Mississippi River. The Memphis to St. Louis, St. Louis to Memphis, and Memphis to Carruthersville busses were refueled there (R. 6, 14, 49). The result was that the northbound busses on these routes could be supplied with fuel only sufficient to reach Caruthersville, 105.2 miles from Memphis. That trip could be made on 21 gallons of gasoline. Seventy-seven and nine-tenths miles of this route are in Arkansas, that mileage requiring 15.6 gallons of gasoline (R. 46). Appellee could put into the fuel tank of a bus at Memphis 30 gallons of gasoline, make the trip to Caruthersville with an ample reserve supply, and pay the tax on 10 gallons.

At some time after the suit was begun appellee discontinued refueling at Caruthersville and adopted the present arrangement (R. 49). This is solely for its own convenience. The result brought about by this change is commented upon at length by the Circuit Court of Appeals in describing appellee's operations between Memphis and St. Louis, which would indicate that the Court gave it some weight (101 F. 2d, p. 573, R. 69). Now if the evidence at the trial had showed that appellee was refueling at Caruthersville the Circuit Court of Appeals would not have had before it the evidence mainly referred to in its opinion. Assuredly the constitutionality of Arkansas statutes cannot be made to turn on the conduct of a carrier outside of

the State which in no way changes his use of the highways within the State.

We shall now show the changes that can be made in the table of computations, made a few pages before, based on refueling at Caruthersville. The changes will appear with respect to route (1), Memphis to St. Louis, and return, and route (3), Memphis to Caruthersville, Missouri, and return. In the second preceding paragraph we have considered only the tax arising from northbound traffic. The tax paid on gasoline carried by southbound busses would be less by a few gallons because it is 24.3 miles from Caruthersville to the State line. However, to avoid too extensive computations we shall use the northbound figures for all busses.

One trip one way on either route (1) or (3) under the preceding assumptions would cost appellee the tax on ten gallons, 65 cents. On a round trip on each route the tax would be $1.30. The round trip mileage in Arkansas on each route is 155.8, on which the tax on gasoline required for such Arkansas mileage would be $2.06.

We may therefore show how the above table would be changed on the basis of refueling at Caruthersville, Missouri:

| Route | Amount of tax which would be required on gasoline actually consumed in Arkansas. | Amount of tax which would be paid by appellee if it followed former practice of refueling at Caruthersville. |
|---|---|---|
| (1) | $2.06 | $1.30 |
| (2) | 1.86 | .98 |
| (3) | 2.06 | 1.30 |
| (4) | 1.82 | .98 |
| Total | $7.80 | $4.56 |

We think these illustrations unnecessary to sustain the statutes, but they do definitely establish that the 20 gallons exemption permits a motor vehicle operator to avoid excessive or duplicate gasoline tax payments to Arkansas.

C. There is, however, a further independent ground to sustain Act 67. It is admittedly within the power of the State to require gasoline taxes of motor vehicle users for the privilege of using the highways, even though engaged wholly in interstate commerce. The State could require a vehicle on an exclusively interstate trip to pay the tax upon the exact number of gallons used in the State. This, however, would involve a system of policing each individual vehicle as it entered and left the State, which would clearly run into excessive administrative costs. Instead of going to all that trouble, expense and risk of loss the State can employ a more simple and easily enforceable device even though it may work hardship in some cases. *Aero-Mayflower Transit Co. v. Georgia Public Service Commission, supra,* (295 U. S. 285, 289).

Such an easily administered device has been adopted by the State of Arkansas in the law requiring payment of the tax upon gasoline in excess of twenty gallons brought into the State in the fuel tanks of a motor vehicle. Laying aside at this point the proposition, obvious in itself, but fully demonstrated above, that a motor vehicle operator can "adjust the movements of its motor vehicles to the requirements of the law" so as to avoid payment of excess tax to the State of Arkansas, Act 67 can be sustained even though it may work a hardship in some cases by requiring the tax upon a larger quantity of gasoline than is actually used in the State. In that respect the Act lies within the

class of statutes sustained under the rule of *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201. There a law forbidding the sale of non-intoxicating malt liquors was sustained on the ground that it was a necessary measure, in the legislative judgment, to prevent evasion of the law forbidding the sale of intoxicating liquors. The Court said:

> "It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

In *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388, this Court said, citing the *Purity Extract* case:

> "The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity."

Thus Act 67 can be sustained as effecting a "reasonable margin to insure effective enforcement." This principle is applicable not only to the exercise of police power but also the taxing power. In *Milliken* v. *United States*, 283 U. S. 15, 24-25, this Court said:

> "Further, as an appropriate and indeed necessary measure to secure the effective administration of a system of death taxes, we think the present tax is to be supported as an incident and in aid of the exercise of the constitutional power to levy a tax on the transfer of the decedent's estate at death. See *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192; *Jacob Ruppert* v. *Coffey*, 251 U. S. 264; *Lambert* v. *Yellowley*, 272 U. S. 581."

In *Burnet* v. *Wells*, 289 U. S. 670, 678, it is also said:

> "Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits."

This case also cites as authority for the foregoing *Purity Extract & Tonic Co.* v. *Lynch*, *supra*. See also the cases cited in footnote 1 of this brief.

The principle of a "reasonable margin to insure effective enforcement" is exemplified in the cases decided by this Court in which the Court has held valid substantial, lump sum, annual license fees as to an interstate motor vehicle operator who admittedly wanted to make only one, or a very few trips per year, into the State. Fees of that character are held valid as to such an operator even though persons making daily use of the State's highways pay the same fees and no more. *Hicklin* v. *Coney*, 290 U. S. 169; *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, *supra*, (295 U. S. 285); *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160.

In view of these holdings it is assuredly competent for the State to base the amount of gasoline tax to be paid by an interstate motor vehicle operator upon the reasonable lump sum theory expressed in Act 67.

## III.

## THE REASONS ASSIGNED BY THE CIRCUIT COURT OF APPEALS FOR ITS DECISION ARE INSUFFICIENT TO OVERTHROW ACT 67 OF 1933.

A. The Circuit Court of Appeals assigned various reasons for its decision. The controlling one appears to be

expressed in the following statement, which is concluded by the Court's assertion "We think this case is ruled by *Interstate Transit, Inc.* v. *Lindsey, supra*" (283 U. S. 183). The Court's conclusions are plainly wrong and it is obvious that it utterly misunderstood *Interstate Transit, Inc.* v. *Lindsey.* The Court said (101 F. 2d, p. 574, R. 70):

> "Reduced to its lowest possible terms, the question for decision, we think, is whether the imposition of the tax upon gasoline carried for use in other States, in the fuel tank of a motor vehicle traveling in interstate commerce can be sustained.
>
> "That the tax is a direct burden on interstate commerce, cannot be controverted.
>
> "If it is to be sustained at all with respect to gasoline to be used in other States, it must be sustained upon the theory that the method employed for determining the amount of the tax constitutes a fair measure for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of the highways of the State. In *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, the Supreme Court said (quoting from opinion):
>
> "While we can understand how the use of State highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one State can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another State.
>
> "We think this case is ruled by *Interstate Transit, Inc.* v. *Lindsey, supra.* * * *"

Appellant feels that the court's conclusions are erroneous and are based upon a complete misconception of *Interstate Transit, Inc.* v. *Lindsey.*"

It is submitted that the Court's reasoning has been shown to be erroneous by the previous parts of this brief. (a) The Act in no sense constitutes "the imposition of the tax upon gasoline carried for use in other States." The purpose of the twenty gallons exemption is to permit a carrier to take through Arkansas a reasonable amount of gasoline free from the tax for use in other States. With that margin to work on the carrier can easily adjust its operations so that it pays to Arkansas no more than the tax on the gasoline it actually uses in Arkansas; in truth, it will usually pay less, as has been demonstrated above in our analysis of appellee's actual operations. (b) The Act does, under every standard fixed by decisions of this Court, constitute "a fair measure for ascertaining the compensation which lawfully may be exacted" for the use of the highways. The carrier is free to fill or re-fill its fuel tanks in such a way as to obtain precise mileage value of the use of the highways; just as this Court pointed out in *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 289, and in *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 72, both discussed above, the carriers there were free by adjustment of the use of their vehicles to obtain full road use value for the taxes paid. But in the instant case the carrier can by much easier and much less adjustment obtain far more precise mileage value than could possibly be obtained in the two cases last cited. (c) The Act does not in any sense measure the value of the use of the Arkansas highways by the amount of the gasoline carried in the fuel tank for use in other States. Instead, by giving the twenty gallons exemption, the Act permits the motor vehicle operator to limit to his actual mileage in

the State the amount of tax he will pay for the use of the Arkansas highways.

B. The erroneous conclusions in the portion of the opinion set out above apparently were induced, in part at least, by the Court's misunderstanding of *Interstate Transit, Inc.* v. *Lindsey, supra* (283 U. S. 183). In the first place, the *Lindsey* case is not in point here at all in view of the decision of the Supreme Court of Arkansas in *Sparling* v. *Refunding Board, supra* (189 Ark. 189, 71 S. W. 2d 182), that Act 11 of 1934 requires a tax for the privilege of using the highways. All the *Lindsey* case holds is that before a tax can be validly required of an interstate motor vehicle operator it must appear in some way that such tax is required for the privilege of using the highways or for administering the highway and traffic laws.

In the second place, the Court misapplied it. The Court thought the *Lindsey* case requires a State law imposing taxes on interstate motor carriers to be based with some nicety on the amount of actual use which such carriers make of the highways. The case plainly does not hold that. The tax was held invalid in *Interstate Transit, Inc.* v. *Lindsey*, only because it did not possess a single attribute of a charge for the privilege of using the highways. If it had possessed any one such attribute the opinion in that case and later decisions of this Court indicate that it would have been held valid. That is, if the proceeds had been dedicated to highway use it would have been held valid regardless of the fact that it was an annual, lump-sum tax and that its amount was not determined by the mileage traveled. *Hicklin* v. *Coxey*, 290 U. S. 169, 173. But even if the proceeds had not been devoted to the highways it would have

been sustained, regardless of its lump-sum nature, if it had possessed some other characteristic of a charge for the privilege of using the highways. *Morf* v. *Bingaman*, 298 U. S. 407, 412.

Because of the extreme emphasis the Circuit Court of Appeals placed on the *Lindsey* case, and because of its clear misunderstanding of the case, we desire, although at the rather plain risk of redundancy in argument, to analyze the case fully. The *Lindsey* case involved a Tennessee statute which imposed privilege taxes on every business in the state, 160 different kinds of businesses in all. The particular privilege tax complained of was one imposed upon the business of operating motor busses, assessing $500 per bus for the complainant's busses. This Court's opinion points that out with care (pp. 186-187) and further points out that the statute was not physically or otherwise a part of the law of the state which related to raising funds for highway purposes (p. 188), and that the revenue obtained by the statute did not go into the highway fund but into the general fund (p. 189), and that payment of the tax was not a prerequisite to the use of the highways. The Court therefore found that the tax did not possess any attribute showing it to be a charge exacted for the privilege of using the highways (which would have been valid), but found that the tax was simply a part of a general tax plan of the state laying privilege taxes upon *all businesses*, which could not be required of one engaging wholly in interstate commerce.

However, the Court further examined the tax (apparently at the urging of counsel, p. 190) to determine whether it bore any possible earmark to show that it was a fee for

the privilege of using the highways as contrasted with a charge upon the business of engaging in interstate commerce, and that is where this court employed the language relied on by the Circuit Court of Appeals. It is clear that when the Supreme Court stated that the fee was a flat fee and was not proportioned to the use it was not stating that *proportioning the tax to the use* is a necessary requisite of validity when applied to interstate motor vehicle taxes, but that it was only pointing out that the act did not possess even that one attribute to show that it was a charge for the privilege of using the highways. A careful reading of the Court's opinion shows that it is simply a progressive search to determine whether the tax possessed any one characteristic to show that it was a tax for the privilege of using the highways. And it is evident from the opinion and from later opinions which cite the case that had the tax possessed any one attribute showing it to be a tax for the privilege of using the highways the Court would have held it valid regardless of its flat fee nature; that is, if the proceeds had been devoted to highway use, or if payment had been a prerequisite to the use of the highways, the tax would have been held valid.

In the *Lindsey* case itself the Court pointed out that whether a tax is valid tax for the privilege of using the highways may be determined as follows (p. 186):

> "This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, *or* otherwise." (Emphasis supplied.)

Note that these indicia, including proportionment to the extent of the use, are stated in the alternative. So the reason the tax was held invalid in *Lindsey* case was not because it was not proportioned to the extent of the use, but *was* because it lacked *any* of the indicia of a tax for the privilege of using the highways.

The foregoing, plain in the opinion in *Interstate Transit, Inc.* v. *Lindsey*, itself was expressly pointed out in two later cases, both involving flat, substantial fees not proportioned to the use, *Hicklin* v. *Coney*, *supra* (290 U. S. 169), and *Morf* v. *Bingaman*, *supra* (298 U. S. 407). The same principle was stated in *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm.*, *supra*, (295 U. S. 285).

In *Hicklin* v. *Coney* a statute imposing a flat, unvarying license fee as high as $400 per year for one vehicle was held valid as to interstate motor carriers making irregular trips into the state. The amount of the fee was based solely on "carrying capacity," the annual fee for a truck with a carrying capacity of five tons being $400.[a] The complainant cited as authority for the invalidity of the fee *Interstate Transit, Inc.* v. *Lindsey* and made the same argument the Circuit Court of Appeals uses; that is,

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[a] The statute is set out in full in the opinion of the Supreme Court of South Carolina in *State* v. *Hicklin*, 168 S. C. 440, 167 S. E. 674, which was affirmed by the Supreme Court in *Hicklin* v. *Coney*, *supra*, as follows:

"With regard to holders of certificate 'F' to which class the respondents herein belong, section 8512 provides: For vehicles of carrying capacity of not over one and one-half tons, thirty ($30.00) dollars; for vehicles of carrying capacity of over one and one-half tons and not over two tons, sixty ($60.00) dollars; for vehicles of carrying capacity of two tons and not over three tons, one hundred twenty ($120.00) dollars; for vehicles of carrying capacity of over three tons and not over four tons, two hundred ($200.00) dollars; for vehicles of carrying capacity of four tons and not over five tons, four hundred ($400.00) dollars; for vehicles equipped fully with pneumatic tires; for vehicles equipped fully or partially with solid tires these fees shall be doubled."

that since the fees were not proportioned to the use they were invalid (see briefs of counsel in 78 L. Ed. 247). This Court held against complainant's argument and pointed out that complainant's understanding of *Interstate Transit, Inc.* v. *Lindsey* was erroneous, saying (290 U. S. 169, 173):

> "Appellant insists that an undue burden is placed upon interstate commerce because the license fees are based on the 'carrying capacity' of the vehicles. The state court held that the fees 'are collected, as provided for by Section 8517, for the purpose of maintaining the public highways over which such motor vehicles shall operate, as compensation for their use.' The statute provides for the segregation, for this purpose, of the moneys collected. See *Clark* v. *Poor*, 274 U. S. 554, 555-557. *In this view the fees are not open to the objection raised in Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186, 188. Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways." (Emphasis supplied.)

There the Court points out clearly that a flat fee, substantial in amount, as was the fee in *Interstate Transit, Inc.* v. *Lindsey*, is nevertheless valid as to interstate carriers *if the proceeds are devoted to highway use.* That is, the fee is valid if it has *one* attribute showing it is exacted for the privilege of using the highways even though it may lack all other attributes to show that character. The trouble with the statute in *Interstate Transit, Inc.* v. *Lindsey*, was that it did not have even one attribute of a highway use license tax.

The foregoing principle was again expressly stated in *Morf* v. *Bingaman, supra* (298 U. S. 407). The statute in that case imposed a flat fee regardless of mileage or weight. The fee assessed was substantial because it was

a charge levied for only one trip by a passenger automobile of not more than 166 miles. Thirty-five per cent of the proceeds were not devoted to any highway use. It was argued that since part of the proceeds were diverted to non-highway use, the tax was invalid as to interstate carriers. *Interstate Transit* v. *Lindsey* was relied upon as authority for that proposition. The Court pointed out, however, that since the fee had *one* attribute of a highway use tax (payment of the fee as a prerequisite to the use) it was valid without any other attributes. The Court said (p. 412):

> "As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. * * *
>
> "The use for highway maintenance of a fee collected from automobile owners may be of significance, *when the point is otherwise in doubt*, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit* v. *Lindsey*, 283 U. S. 183, *supra*. But where the manner of the levy, like that prescribed by the present statute definitely identifies it as a fee charged for the grant of the privilege it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other." (Emphasis supplied.)

C. In addition to those already discussed, the Court stated two other grounds for its decision, which will now be considered briefly. It said (101 F. 2d, p. 576, R. 73):

> "It (the statute) imposes a direct burden not only upon the interstate commerce done by the appellant in

the State of Arkansas, but also upon the interstate commerce which it carries on in other states. By taxing the means whereby a bus makes a through trip from Memphis to St. Louis, the state taxes gasoline which is merely transported through Arkansas for use in interstate commerce in Missouri."

The fallacy in that statement has already been made apparent in earlier parts of our brief. Whenever appellee, or any other motor vehicle operator, leaves the state without having refueled in the state, and with not more than twenty gallons of gasoline in its fuel tank, the State of Arkansas will not collect a tax on gasoline which is transported through the state for use in other states. There is assuredly nothing unreasonable in that. The motor vehicle operator is left free to manage his business in such a way as to avoid paying the Arkansas tax on gasoline which he will use in other states, and he is allowed the reasonable margin of twenty gallons for his calculations. As a means of requiring the operator to pay some tax without excessive administrative machinery and cost, the state is entitled to demand the tax on all gasoline in excess of twenty gallons when the vehicle enters the state; and the operator can control the amount of tax he pays by exercising the same simple degree of care that payers of every species of tax must observe in this day and time. *Curry* v. *McCanless*, 307 U. S. 357.

D. The Court further said (101 F. 2d P. 576, R. 74):

"Another consideration which militates against sustaining the sort of tax which Arkansas seeks to exact from the appellant here is that that would open the door to the cumulative taxation of the same gasoline by all states through which an interstate motor vehicle passes."

Obviously that would not be true unless the vehicle operator aggressively willed it to be so. A non-cooperative taxpayer can undoubtedly find many unnecessary burdens to shoulder if he looks for them, *Curry* v. *McCanless, supra,* but his enterprise in that respect will not build up a case for the unconstitutionality of the laws, *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission, supra,* (179 Ga. 431, 442; 176 S. E. 487, 493; aff. in 295 U. S. 285, 289). The Circuit Court of Appeals cites cases to the effect that state laws are unconstitutional burdens on interstate commerce where they are of a character to permit taxation of the same interest by all of the states. See *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (although the tax there was held not to be the forbidden type). But such authorities are not in point here. They have to do with statutes where the taxpayer is powerless to prevent multiple state taxation, such as the taxation of the gross income from interstate commerce. The instant statute is of a different character because the taxpayer can accurately delimit his payments to the mileage traveled and the gallons consumed within the state. Compare *Western Live Stock* v. *Bureau of Revenue, supra,* p. 260.

We think *Western Live Stock* v. *Bureau of Internal Revenue* instead of being against us as the Circuit Court of Appeals seemed to think, answers, in a broad, general way, most of the arguments of appellee and the reasoning of the Court of Appeals. Much of such argument and reasoning is based on the alleged added expense and the claimed inconvenience to which Act 67 will put appellee. But in that case this Court said (p. 254):

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from

their just share of the state tax burden even though it increases the cost of doing business. 'Even interstate business must pay its own way.' " (Citing cases.)

## IV.

We have been arguing this case as if there were no authority squarely in point to support Act 67. But we think that such authority exists in *Bingaman* v. *Golden Eagle Western Lines, supra,* 297 U. S. 626. We do not think the statement in that case, holding that the tax would have been valid if it were a tax for the privilege of using the highways, sinks to the level of dictum. The only controversial point exhibited in the opinion is the nature of the tax, whether it is a charge for the privilege of using the highways or otherwise. That inquiry was made necessary by the express determination of the Court that if the tax is exacted for the privilege of using the highways "the tax should be sustained," (p. 628). We understand that this Court will not undertake the interpretation of the meaning of a state statute if such inquiry is unnecessary; that is, unless the other factors in the case are all resolved in favor of the validity of the tax. They were so resolved in the *Golden Eagle* case. It is therefore submitted that under the authority of that case alone Act 67 should be sustained.

## CONCLUSION

For all of the foregoing reasons, which are summarized in the summary of argument on page 13 hereof, the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed, and the judgment of the District Court for the Eastern District of Arkansas dismissing plaintiff's (appellee's) complaint should be affirmed.

Respectfully submitted,

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## APPENDIX A

Parts of Act XI of the Acts of the Second Extraordinary Session of the 49th General Assembly of Arkansas of 1934, p. 28.

A BILL for an Act to Be Entitled: "An Act to Refund Highway and toll Bridge Obligations of the State and Road Improvement District Obligations; to Provide for the Payment and/or Funding of Certificates Issued in Aid of Municipal Improvement Districts; to Provide for the Funding and/or Payment of Claims Against the State Highway Commission, and for Other Purposes."

SECTION 2. There is hereby created in the State Treasury an account to be known as the State Highway Fund.

The first charge upon the State Highway Fund shall be the cost of maintaining the State Highway system and the operation and maintenance of the Toll Bridges, and the Treasurer of State shall transfer from said State Highway Fund to the Highway Maintenance Fund 25% of the total amount credited to said State Highway Fund during any fiscal year, such credit to be not less than $166,666.00 monthly, and not more than $100,000.00 for each fiscal year may be appropriated for the operation and maintenance of said Toll bridges.

SECTION 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State."

SECTION 23. Paragraph (e) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"(e) All net tax derived from motor vehicle fuel under the provisions of Paragraph (c) of this Act shall be divided: Ninety two point three per cent (92.3%) shall be deemed State Highway Revenue, and Seven point seven per cent (7.7%) shall be deemed County Highway Improvement Revenue, and shall be credited by the Treasurer of the State to the 'County Highway Fund.' Said County Highway Fund shall be segregated, set apart and placed in trust for the sole, separate and exclusive use of the several counties of this State to be apportioned under the existing laws, and the State expressly covenants that it will not permit the percentage herein allotted to the County Highway Fund to be reduced. Providing that the refund going to any County in the State having a bridge district where the bridge is across a navigable stream, as defined by the Department of Commerce of the United States Government and is located not less than seven miles from the County seat of said County, and constitutes a continuation of a State Highway, the funds going to the County under the terms of this Act shall be allotted to the Bridge Commission to be applied to the retirement of the Bridge District Bonds, and the County Treasurer shall pay such funds to the proper Trustee for such application. Provided further that this amendment does not apply to toll bridges. Provided that one-half of the refund going to any other county in this State other than the counties herein classified or in which the refund is controlled by any existing legislation shall be allotted to the Bridge Commission of any Bridge District where the bridge constructed by the district is across a navigable stream as defined by the Department of Commerce of the United States Government and constitutes a link in a State Highway, and where said bridge is situated not less than one mile from the County Seat.

SECTION 25. Section 2 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"SECTION 2. The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, when used in this State; double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable.

"The tax herein levied is to be collected at the source in this State of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this State, then when first brought into this State for use herein.' Provided that notwithstanding any provision or provisions contained in this Act to the contrary, no person, firm or corporation who manufactures motor vehicle fuel in this State from crude oil and its derivatives shall be required to pay or collect the tax imposed by this Act on any such motor vehicle fuel that said person, firm or corporation sells and ships to the purchaser in a railway tank car. This provision, however, shall not relieve any person, firm or corporation from making reports to the Commissioner of Revenues showing the amount of motor vehicle fuel sold in railway tank cars, and the tax upon such motor vehicle fuel so shipped in railway tank cars shall be collected and paid by the person, firm or corporation which purchases the motor vehicle fuel which is shipped in a railway tank car."

SECTION 48. The state expressly covenants that so long as any of the obligations authorized by this Act are outstanding, it will not permit Section 23 of Act No. 65 of the General Assembly, approved February 28, 1929, or Section 24 of said Act, as amended by this Act, to be repealed, or amended, so as in any manner to reduce the revenue therein provided for; if a substitute fuel for motor vehicles or improvements in equipment, or a change in conditions shall reduce the

annual revenue from automobile licenses and fees and gasoline or motor vehicle fuel taxes below $8,537,000.00, it will amend Sections 23 and 24 of said Act, as so amended, so as to provide for a minimum annual revenue of $8,537,000.00 from such licenses, fees, and taxes; and, except as provided in this Act, it will not issue in the aggregate more State Highway obligations, including obligations authorized by this Act, or any other obligations secured wholly or in part by taxes on gasoline or motor vehicle fuel, or revenue collected from automobile licenses and fees, than can be fully paid, with the interest thereon, from a revenue of $8,537,000.00 a year.



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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939.

No. 138

Z. M. McCARROLL, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS ..... *Appellant,*

v.

DIXIE GREYHOUND LINES, INC. ..... *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## REPLY BRIEF OF APPELLANT

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IN THE

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v.

Dixie Greyhound Lines, Inc. ..... *Appellee.*

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## REPLY BRIEF OF APPELLANT

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### REASONS FOR FILING REPLY BRIEF

In this reply brief we have no intention to reargue the points covered in our first brief. Appellee's brief, in part III, pp. 29-34, covers a point not raised in the District Court, not mentioned nor made a basis of decision in the opinion of either Court below, and not touched in our first brief. Therefore, we argue that point fully in part III of this reply brief. In the other parts of this reply brief we discuss very briefly the authorities chiefly relied upon by appellee and a few points in appellee's argument.

## SUMMARY

### I.

Reply to part I, pages 15-24 of appellee's brief.

### II.

Reply to part II, pages 24-29 of appellee's brief.

### III.

Reply to appellee's third point, brief pages 29-34.

A. It was not raised in District Court.

B. It is without merit,

(1) When Act 67 and Act 11 are construed together,

(2) When Act 67 is construed alone.

### IV.

Reply to part IV, pages 34-46 of appellee's brief.

## I.

## REPLY TO PART I, PAGES 15-24 OF APPELLEE'S BRIEF.

Appellee's argument on its first point, pp. 15-24, only serves to illuminate further the evident propositions (1) that Act 67 of 1933 does not constitute a demand that a motor vehicle operator pay an arbitrarily fixed tax to the state, not related to the use of the highways; (2) but that it does offer to the operator a flexible plan whereby he himself can determine that the tax he pays to Arkansas shall never exceed the amount of the tax on gasoline con-

sumed in Arkansas. Compare *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 289. At the foot of page 15 and top of page 16 appellee lists what it terms three burdensome alternatives imposed upon it by the enforcement of Act 67 of 1933. However, the three alternatives outlined are not a complete nor accurate statement of the choices open to it, as partially appears on page 16 of appellee's brief. Instead of these it can (1) enter the state with 20 gallons or less and if that amount is insufficient for operation in Arkansas add in Arkansas a sufficient amount, thereby paying to Arkansas no more (probably less) than the tax on gasoline actually used there, and avoiding payment to other states of the tax on gasoline taken on in Arkansas; or (2) enter Arkansas under the circumstances detailed in pages 26-28 of our first brief and pay to the state approximately half of the amount of tax which would be required for the gasoline actually consumed in Arkansas. So the laws in question actually do permit an operator to adjust his tax payments to the use of the highways in substantially the same degree as if he were paying a mileage tax. Compare *Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245. No unconstitutional burden is imposed on one engaged in interstate commerce by a law which affords him a practical means of avoiding multiple tax burdens, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 259. A state may impose special regulations upon interstate commerce to meet "the exigencies of a particular situation," *New Mexico ex rel. McLean* v. *D. & R. G. R. R. Co.*, 203 U. S. 38, 54.

Appellee discusses at length two cases which do not afford its position the least support, *Helson* v. *Kentucky*, 279 U. S. 245, and *Western Live Stock* v. *Bureau of Reve-*

*nue, supra,* (303 U. S. 250). There are two features which distinguish the instant case from the *Helson* case: (1) The tax here in question is imposed for the privilege of using the highways, (2) upon one using the highways extensively as a place of business; and these make our tax valid. Neither of these factors was present in the *Helson* case. On pages 39-40 of our first brief we discussed *Western Live Stock* v. *Bureau of Revenue, supra,* pointing out that our tax is valid under the principle there considered because the taxpayer can by the exercise of just ordinary judgment prevent the taxation of the same interest by more than one state.

At the bottom of page 23 appellee cites, as proof of the alleged possibilities of multiple taxation inherent in Act 67, the example of a bus traveling from New York City to Richmond, Virginia, over U. S. Highway No. 1, assuming in the states traversed laws similar to Act 67. But that only proves, again by a practical example, the validity of Act 67. The bus could start from New York City with 20 gallons of gasoline (enough for 100 miles) and run to Philadelphia, a distance of 88 miles, traversing New Jersey on the way without payment of tax. (U. S. No. 1 misses Delaware.) At Philadelphia the fuel tank would be filled until it held 30 gallons. Ten of these would be consumed traveling the 55 miles to the Maryland boundary, and the bus would enter Maryland with 20 gallons. From the Maryland boundary it is 93 miles to Alexandria, Virginia, where more gasoline would be taken on. The bus would have to be refueled in Virginia anyway, even if it left New York with enough gasoline to reach Richmond without a refill. So on that journey the bus operator could comply with laws similar to Act 67 of 1933 in five states and

the District of Columbia and pay a tax in other than the termini states only once—on the thirty gallons purchased in Philadelphia. Interestingly enough, but not necessary for the validity of the law, the tax paid on that thirty gallons (enough for 150 miles) would come about as close as can be demanded in a practical scheme of taxation, to being equal to the tax upon the gasoline consumed on the 143 miles traversed from New York City to the Maryland boundary. We anticipate appellee's objection that the haphazard nature of Act 67 is demonstrated by the fact that New Jersey, Maryland, and the District of Columbia, will collect no gasoline tax, but we call to mind that there is nothing haphazard about that. The 20 gallons exemption is extended to avoid any possible unfairness, and "a taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power," *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587.

The foregoing illustrates, forcibly we submit, that Act 67 affords a fair and practical method whereby Arkansas can collect some gasoline tax from interstate operators who otherwise would pay no tax, and that in its practical operation the Act will not occasion any unconstitutional burden or multiple taxation. The "burden" of complying with Act 67 is not an unconstitutional burden; it is less of a "burden" than other "burdens" which have been held valid; see *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, particularly pages 188-189 including note 5.

Over and beyond the arguments above advanced there is a further reason why the argument of appellee involving

multiplicity of taxes is not pertinent in the instant case. It is to be noted that the tax under consideration is to be levied not upon the sale or use of gasoline but is to be levied as a tax for the privilege of using the highways of the State of Arkansas. Consequently the possibility of a tax by several states upon the same commodity is not present since the tax levied is not upon the gasoline itself, but rather sets up the gasoline in the tank of a vehicle coming into the state as a basis for the tax to be levied for the privilege of using the highways of Arkansas. And as heretofore pointed out the motor vehicle operator has it within his power to fix the amount of such tax by limiting the amount of gasoline in the fuel tank of a vehicle at the time of entering the state.

## II.

## REPLY TO PART II, PAGES 24-29 OF APPELLEE'S BRIEF

Appellee's argument in pages 24-27 is based on its erroneous understanding of *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183. This has been covered in our first brief, pp. 33-38. Appellee's further argument, pp. 27-29, has been met in part I of this reply brief and in our first brief, pp. 18-28.

## III.

## APPELLEE'S THIRD POINT, BRIEF PAGES 29-34, WAS NOT RAISED IN DISTRICT COURT, AND IS WHOLLY WITHOUT MERIT.

Appellee's third point, pages 29-34 of its brief, covers a subject matter not touched in appellant's brief. This third point can be disposed of in two ways: (A) It was

not raised by appellee in the District Court, hence is not before this Court. (B) It is without merit.

Appellee's contention is that certain provisions of Act 11 of 1934 so control Act 67 of 1933 that even if the latter act is constitutional the authority of the state under it is only to collect the gasoline tax on the gasoline in the fuel tanks, in excess of 20 gallons, which is actually *used* in Arkansas. Appellee claims that since Act 11 requires a privilege or excise tax upon gasoline "sold or used in this state," then in no event can the tax be collected under Act 67 of 1933, except upon gasoline used in the state.

A. This point was not raised in the District Court. Appellee's bill of complaint as amended (R. 1-15) contains no reference to it; it cannot be found there even by the exercise of the most liberal construction and the widest imagination. Every claim of invalidity alleged is based wholly on conflict with the Constitution of the United States. The first eight lines of paragraph VIII of the bill (R. 11) cannot be construed to raise this point because these lines are specifically limited to invalidity under the Commerce Clause by the remainder of the sentence, these first eight lines being connected to the rest of the sentence by the limiting phrase in the ninth line "for the reason."

Nowhere in the bill of complaint as amended are there words which even remotely approach an allegation that because Act 11 of 1934 requires a privilege or excise tax upon gasoline "sold or used" in Arkansas, the power of the state under Act 67 of 1933 is limited to the collection of the tax upon gasoline in the fuel tanks, in excess of 20 gallons, which is actually used in Arkansas.

As this claim was not before the District Court it was not mentioned in that Court's opinion or findings (R. 24-

32). For the same reason the point does not appear in the opinion of the Circuit Court of Appeals (R. 67-74). That court based its decision solely on repugnancy to the Commerce Clause.

Because appellee did not, in its attack upon the statutes, include this point in its bill of complaint, it is plain that appellee cannot interject the point into the case in this Court. *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 294; *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 484-485; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186. In the *Aero-Mayflower* case this Court said (p. 294):

> "We do not attempt to pass upon the *meaning* of the provisions considered in the foregoing paragraph, or upon their validity under the Fourteenth Amendment * * *. No question as to their *meaning* or validity was raised by the appellant in its petition or complaint." (Emphasis supplied.)

The first place in the record where appellee even attempted to make this claim was in assignment of error 7 (R. 57) on its appeal to the Circuit Court of Appeals. If that assignment had been sufficient to raise the point, it was then too late. *Pittsburg C. & St. L. Ry. Co.* v. *Heck*, 102 U. S. 120; *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission, supra.* But it is submitted that such assignment in itself is insufficient. The only statute mentioned in it is Act 11 of 1934. There is nothing in that act about paying the tax upon all gasoline in excess of 20 gallons in the fuel tanks of a motor vehicle. The assignment does not make the point that Act 67 of 1933 is limited by Act 11 of 1934, as claimed by appellee. Furthermore this assignment is not directed to any action of the

District Court; that Court nowhere made the holding attacked. The Court held that Act 67 of 1933 and Act 11 of 1934 together require payment of the tax in question.

For these reasons this question of statutory construction is not before this Court.

B. We now consider this contention on its merits. It is plain that it has no merit. It is ruled out by relevant legislative history and judicial authority including decisions of this Court and of the Supreme Court of Arkansas. While there is no "doubt" present here, it may be well to observe that appellee's statement with respect to tax laws, "in case of doubt they are construed most strongly against the government" (p. 32), has no force or validity in this case, *White* v. *United States*, 305 U. S. 281, 292. If there were any merit in appellee's point it could be only on the theory of implied repeal; and the familiar presumption against implied repeal has "most appropriate application" with respect to tax laws, *Wood* v. *United States*, 16 Peters 342; *Graham* v. *Goodcell*, 282 U. S. 409; *Morf* v. *Bingaman*, 298 U. S. 407.

On its merits this point should be considered in two divisions: (1) the construction together of Act 67 of 1933 and Act 11 of 1934; and (2) the construction of Act 67 of 1933 independently of other laws. Most assuredly there is no validity in appellee's contention (p. 30) that Act 11 is to be considered alone and Act 67 is not to be considered at all.

(1) Act 67 of 1933 is prior in time to Act 11 of 1934. In considering the construction together of the two Acts it becomes important to learn what laws, corresponding to the relevant parts of Act 11 of 1934, were in effect when

Act 67 of 1933 was enacted. That is, to ascertain the legislative intent in the enactment of Act 67 of 1933 the laws then in effect and affected by it must be considered.

The parts of Act 11 of 1934 relied upon by appellee in making this point are set out in pages 30-31 of its brief. (Appendix A, page 43, of our first brief also contains parts of Act 11 of 1934.) It will be observed that Section 22 of Act 11 of 1934 is, by its express terms, a re-enactment in amended form of paragraph (c) of Section 1 of Act No. 63 of 1931; and that Section 25 of Act 11 of 1934 is a re-enactment in amended form of Section 2 of said Act No. 63 of 1931. These 1931 statutes were in effect when Act 67 of 1933 (page 4 of our first brief) was enacted; and we examine them in aid of the construction of Act 67.

The parts of said Act 63, p. 171, Acts of the General Assembly of Arkansas of 1931, which were superseded, by amendment and reenactment, by the said parts of Act 11 of 1934, are the following:

(Act 63 of 1931)

Section 1, par. (c):

"(c) There is hereby levied a privilege or excise tax of six cents (6c) on each gallon of motor vehicle fuel sold in the state, or purchased for sale in the state for the purpose of propelling any motor vehicle on the public roads or highways in the state."

Section 2:

"Section 2. Section 37 of Act No. 65 of the Acts of 1929 is hereby amended to read as follows:

"'It is intended by this statute to impose a tax upon the owners of all motor vehicles using a combustible type of engine, upon the public roads and highways, by requiring them to pay for the privilege there-

of, in addition to the usual license fee, the sum of six (6) cents per gallon for the motor vehicle fuel used, which tax is to be collected at the source in this state of the manufacturer or wholesaler, when sales of any motor vehicle fuel are made, and by him charged in his sales, the proceeds of which privilege tax are to be collected and used as may be provided by law, and on that not used as provided in this section refunds may be obtained by the consumer as provided in this Act.' "

It will be seen that paragraph (c) of Section 1 of Act 63 of 1931 expressly limited the imposition of the tax to gasoline actually sold in the state for use in the state. There was no authority in that section to demand the tax upon any gasoline brought into the state in the fuel tanks of motor vehicles. While that situation was existing, Act 67 of 1933 was enacted laying the tax upon all gasoline in excess of 20 gallons brought into the state in the fuel tanks of motor vehicles. So Act 67 of 1933 extended the tax to gasoline not touched by the 1931 laws. The 1933 act was an attempt by the legislature to reach gasoline that was escaping the tax altogether; it made the tax apply to a narrow, specific field where it had not previously applied. The successive acts of the legislature of Arkansas evidence a continuing purpose to increase the efficiency of gasoline tax collections by extending the tax to previously untaxed gasoline. *Sparling* v. *Refunding Board, supra,* (189 Ark. 189, 71 S. W. 2d 182).

That Act 67 of 1933 was intended by the legislature to be controlling as written in its specific field is plain from its express terms. It is entitled "An Act to Better Enforce the Gasoline Tax, and for other Purposes." It is apparent from the clear and unambiguous terms of Act 67 that it was the intention of the legislature to require

the tax upon all gasoline brought into the state in the fuel tanks of motor vehicles, twenty gallons being exempted. There is nothing in the act which limits the tax to gasoline actually used in the state; on the contrary the Act evidences the legislative intent to extend the gasoline tax beyond the limits of the general gasoline tax laws, as a means of better enforcing the collection of the tax.

The enactment of Act 11 of 1934 did not affect Act 67 of 1933. Section 2 of Act 11 of 1934 continued in effect paragraph (c) of Section 1 of Act 63 of 1931, without affecting Act 67 of 1933. Act 11 exhibits no intent to amend or repeal Act 67; rather, Act 11 was another step by the legislature in tightening up the enforcement of the gasoline tax by extending its coverage to gasoline previously untaxed, *Sparling* v. *Refunding Board, supra,* (189 Ark. 189, 71 S. W. 2d 182). With that intent present in Act 11, it cannot be said that the legislature intended to nullify Act 67 of 1933. This conclusion, plain in itself, becomes absolute upon a consideration of relevant judicial authority.

It will be observed that Act 11, and the statutes it amends and supplements, comprise the general laws for the imposition and collection of the gasoline tax. On the other hand, Act 67 is altogether specific in character. It applies only to one situation, the collection of the tax (fixed as to amount by Act 11) upon gasoline in excess of 20 gallons brought into the state in the fuel tanks of motor vehicles. So the case is governed by the principle expressed in *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209, 215:.

> "An earlier act, specific in its coverage, will be read as an exception to a later one directed to investments generally. 'It is a well settled principle of con-

struction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling.' " (Citing cases.)

In that case the Act of Congress permitting state taxation of shares of stock in national banks was held to authorize taxation of shares owned by the Reconstruction Finance Corporation regardless of the later general Act exempting property of the Corporation from taxation by the states.

The same principle is held in many cases decided by the Supreme Court of Arkansas. *Chamberlain* v. *State*, 50 Ark. 132, 6 S. W. 524, involved the following: An act of Arkansas requiring a license for the sale of intoxicating liquors exempted from such requirement a manufacturer of wine selling only his own products. Thereafter an act, general in terms, was passed which imposed a tax upon each vendor of intoxicating liquors and required a license as a means of collecting the tax. The court held that the exemption in the prior act prevented a manufacturer of wine selling only his own products from being subject to the tax, saying:

> "A general affirmative statute does not repeal a prior particular statute, or particular provisions of a prior statute, unless negative words are used, or unless there be an invincible repugnancy between the two. *The more specific provision controls the general, without regard to their order and dates. The two acts are interpreted as operating together, the specific provisions furnishing exceptions and qualifications to the general rule.*" (Emphasis supplied.)

In *Lawyer* v. *Carpenter*, 80 Ark. 411, 97 S. W. 662, the Court said:

"A general law does not apply where there is another statute governing the particular subject, irrespective of the date of either the general or particular law. Neither repeals the other. The particular legislation covers the narrower field where it is applicable."

This principle is also held in *Washington* v. *Miller*, 235 U. S. 422, 428; *Kennedy* v. *United States*, 265 U. S. 344, 346; *Dunn* v. *Ouachita Valley Bank*, 71 Ark. 135, 71 S. W. 265; *Mills* v. *Sanderson*, 68 Ark. 130, 56 S. W. 779; *Ex Parte Morrison*, 69 Ark. 517, 64 S. W. 270; *State* v. *Kirk*, 53 Ark. 339, 13 S. W. 925; and *Thompson* v. *State*, 60 Ark. 59, 28 S. W. 794.

(2) While it is of course impossible to consider one law entirely apart from others, we now direct attention to the proposition that it is not necessary to consider all this legislative history and judicial authority in order to sustain Act 67 of 1933 as an independent act which levies a tax according to its plain and precise terms. Only for the purpose of fixing the *amount* of the tax is it necessary to refer to other laws. The legislative intent in enacting Act 67 is too plain to require construction. Until the legislature manifests a plain intention to amend or repeal it, it stands unchanged by the mutations in other laws. Regardless of how the tax may apply to other gasoline, Act 67 lays it on all gasoline in excess of twenty gallons in the fuel tank of a motor vehicle entering the state. Thus Act 67 of 1933 is an independent act complementary to the other motor fuel tax acts of the state. Compare *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472.

## IV.

## REPLY TO PART IV, PAGES 34-46 OF: APPELLEE'S BRIEF

In pages 34-37 appellee argues that the tax is not imposed as compensation for the privilege of using the highways. This subject was discussed in our first brief, pp. 15-18. We may here continue our discussion, just had in Part III hereof, of Act 67 of 1933 with reference to appellee's contention (p. 30) that in considering the nature of the tax "Act 67 of 1933 is of no assistance." Assuredly Act 67 can be taken into account in determining the character of the tax in issue here. Act 67 affects only highway users. It requires them to pay the tax of 6½ cents on all gasoline in excess of 20 gallons brought in in fuel tanks of motor vehicles. Payment of the tax is a prerequisite to the lawful use of the highways. Thus Act 67 comes squarely within the test of a tax for the privilege of highway use stated in *Morf* v. *Bingaman*, 298 U. S. 407, 410:

> "Unlike the general tax in *Interstate Transit Incorporated* v. *Lindsey*, 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee. The manner of its collection, not unlike that of a toll for the privilege of entering and using the highways, definitely identifies it as a charge for the privilege."

Regardless of the nature of the tax required by Act 11 of 1934, Act 67 of 1933, by itself plainly requires a tax for the privilege of using the highways. In this view Act 67 may be regarded as an act complementary to other motor fuel tax laws. Compare *Gregg Dyeing Co.* v. *Query*, *supra*, (286 U. S. 472).

Perhaps further emphasis should be given here to the point, plain in the *Sparling* case, that the gasoline tax in Arkansas always has been, and always has been held to be, a tax levied as compensation for the privilege of using the highways. The *Sparling* case cites as authority on that point *Standard Oil Co.* v. *Brodie*, 153 Ark. 114, 239 S. W. 753. There the Supreme Court of Arkansas, construing the state's first gasoline tax law (Act 606 of 1921), said:

> "The tax is not imposed on the sale or purchase of gasoline, nor on the gasoline itself, nor even on the use of gasoline. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured."

Act 11 of 1934 did not change the purpose or nature of the gasoline tax; as pointed out by the Supreme Court of Arkansas in the *Sparling* case, all Act 11 accomplished was to end the granting of refunds to users for non-highway purposes in order to eliminate the principal means of evading the tax. The tax still remains one exacted for the privilege of using the highways. If the Supreme Court of Arkansas erred in any respect in the *Sparling* case (and we submit that it did not), that error did not consist in the holding that the tax is required for the privilege of using the highways but in saying that a highway use tax can be imposed upon non-highway users in order to eliminate a source of wholesale evasion of the tax. And as to an error of that character a highway user cannot complain.

On page 37 appellee cites three cases to the effect that this Court "is not bound by any characterization of a tax on the part of the State Court." The rule appellee tries to invoke obviously has no application here, as is evident from appellee's own authorities as well as later cases, *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 381; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604, 609; *Morehead* v. *New York*, 298 U. S. 587, 609; cases cited p. 17 our first brief.

Pages 38-43 of appellee's argument have been fully answered in our first brief or in this reply brief.

We submit that appellee's comments on *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626 (p. 44) are substantially a confession of judgment. The tax in the Bingaman case was an excise upon the sale of gasoline; the tax in the instant case is one for the privilege of using the highways. This Court stated in the Bingaman case that a tax of the latter description would be valid, and further held that it was bound by the characterization of the tax in the Bingaman case by the Supreme Court of New Mexico. As appellee concludes its argument in this case by stating that the principles of the Bingaman case are conceded by it, it is difficult to perceive just what argument appellee has left to sustain its position.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 138

Z. M. McCARROLL, Commissioner of Revenues of the State of Arkansas — Appellant

vs.

DIXIE GREYHOUND LINES, INC. — Appellee

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF OF APPELLEE

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---

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

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## BRIEF OF APPELLEE

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### Opinions Below

The opinions of the United States Circuit Court of Appeals for the Eighth Circuit and of the District Court for the Eastern District of Arkansas are correctly referred to in appellant's brief.

### Statement as to Jurisdiction

As stated in brief of appellant, the amount of gasoline tax in controversy during each year would undoubtedly exceed the sum of $3,000.00.

With respect to the effect of the action of the Circuit Court of Appeals, and particularly with respect to that last paragraph of its opinion which is quoted, attention is called to the fact that, under the terms of the statutes in question, the tax levied upon gasoline by the State of Arkansas (Act 11 of 1934—Section 22), is purported to be levied not on each gallon of motor fuel brought into the State, but upon each gallon "sold or used" in the State or "purchased for sale or use" therein. To the same general effect is Section 25. There is no express command under the statutes in question to levy and collect this tax on all gasoline in excess of twenty gallons brought into the State; the tax is to be levied only on that gasoline "sold or used" or "purchased for sale or use" in Arkansas. It is therefore believed that the appellant has somewhat misconceived the effect of the action of the Circuit Court of Appeals. That Court, we submit, has not held these Arkansas gasoline taxing statutes generally unconstitutional and void, and has not materially affected their enforcement; it has held that where, as was admittedly the case here, the Commissioner of Revenues interpreted these Acts to require that he collect the Arkansas tax on every gallon, in excess of twenty gallons, brought into the State, regardless of whether such gasoline was or was not to be used in the State, the Acts as thus interpreted by him were or would be unconstitutional insofar as they might be considered to levy a privilege tax on gasoline not to be used on the roads of the State, and that such an application of the tax with respect to gasoline not to be used upon the roads of Arkansas would be enjoined.

## STATEMENT OF THE CASE

### The Evidence

The facts in this case are not a matter of controversy. They are all contained in the affidavits of two of appellee's officers, which affidavits were by stipulation accepted on the same basis as though the witnesses had testified in person; and the contents of these affidavits, together with certain allegations of fact made in the complaint and admitted in the answer, constitute what is in effect an agreed statement. It is believed that the statement of those facts by appellant is unduly brief and that it omits certain important details; therefore we here integrate, in one statement, the undisputed testimony of the two witnesses, appearing in the Record at pages 44-54.

Dixie Greyhound Lines, Inc. (sometimes herein referred to as the "Company"), is a Delaware corporation with its principal office in the City of Memphis, Tennessee, and is qualified to do business in the States of Tennessee, Arkansas, Missouri and elsewhere. Its business is the transportation of passengers by motor vehicle (R. 45). The lines operated by Dixie Greyhound Lines, Inc., or by its wholly owned subsidiary, Dixie Greyhound Lines, Inc., of Illinois, traverse or enter the States of Tennessee, Alabama, Arkansas, Mississippi, Missouri, Kentucky, Illinois and Indiana (R. 45).

Dixie Greyhound Lines, Inc., is a common carrier; and as such, it is subject to control and regulation of the public utility regulatory bodies of the various states in which it does an intrastate business, and is under the control of the Interstate Commerce Commission of the United States with respect to its interstate business wherever

carried on (R. 45). The interstate rates of this Company are under regulation of the Interstate Commerce Commission of the United States; and the purely intrastate rates of such Company, in the various states in which it operates, including the State of Arkansas, are under the regulation of the respective public utility regulatory bodies of the various states, the intrastate rates in Arkansas being under the supervision and regulation of the Arkansas Corporation Commission (R. 52, 53). Regulation of these rates is exercised by the Interstate Commerce Commission and by the state regulatory bodies in the same manner as is customary with other utilities under the supervision of those bodies (R. 53).

Dixie Greyhound Lines, Inc., owns and holds, in various states, numerous certificates of convenience and necessity and operating rights issued or granted to it by the Public Service Commissions of such states, authorizing its operation within those states (R. 46). Pursuant to certificates of convenience and necessity granted to it by the Public Service Commissions of the States of Tennessee, Arkansas and Missouri, the Company operates motor bus transportation for the carrying of passengers, baggage and light express, in both directions, over and upon the following interstate routes, among others:

(1) Between Memphis, Tennessee, and St. Louis, Missouri; traversing the streets and highways of the City of Memphis and State of Tennessee, on United States Highway No. 70 to the Tennessee-Arkansas line, and thence through Arkansas on Highway U. S. 70 to West Memphis; from this point, the route follows United States Highway No. 61 through Turrell, Osceola, Blytheville, and other towns located upon that road, to the Arkansas-Missouri

line; thence the route follows U. S. 61 through Missouri (diverting for several miles to enter the City of Caruthersville, Missouri), to St. Louis. According to the mileage log compiled and used by the Company, the distance between Memphis and St. Louis is 342.7 miles, measured along the route as the buses actually traverse it. Of this mileage, three miles are in Tennessee, 77.9 miles are in Arkansas, and the remaining 261.8 miles in Missouri.

(2) Between Memphis, Tennessee, and Blytheville, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Blytheville. Of this route, three miles are in Tennessee and 71.4 miles are in Arkansas.

(3) Between Memphis, Tennessee, and Jonesboro, Arkansas; traversing United States Highway No. 70, from Memphis to the Tennessee-Arkansas line, and thence through Arkansas via U. S. 70 to West Memphis, and via U. S. 61 to Turrell, and via U. S. 63 to Jonesboro, through the towns located upon those highways. The distance between Memphis and Jonesboro is 73 miles, of which three miles lie in Tennessee and the remaining 70 miles in Arkansas (R. 46-47).

On each of the above mentioned routes, the Company is engaged in furnishing both interstate and intrastate transportation of passengers (R. 47). The Company does not know what will be the character of the patronage offered to a bus which is about to begin a journey, until the passengers actually offer themselves and purchase tickets (R. 53). All interstate and intrastate business handled by Dixie Greyhound Lines, Inc., over any of its lines

traversing the State of Arkansas is transported in the same buses, and without distinction (R. 53). It is not practicable, from an operating point of view, to furnish separate buses or accommodations for interstate or intrastate passengers, or to divide the transportation of the two types of business (R. 53, 54). Interstate passengers very greatly predominate in importance, numbers and percentage of ticket sales (R. 47).

The motor buses used by the Company in the transportation of its interstate passengers, baggage and express, are propelled by gasoline motors (R. 47). The Company is a large user of gasoline in its transportation operations, having purchased and consumed in such operations, 1,259,401 gallons during the year 1935 (R. 47). The cost of such gasoline at the refinery, and the transportation charges and taxes paid thereon, constitute one of the principal elements in the total cost of furnishing transportation (R. 47). It has been found, by the Company, through experience, that the only economical, safe, practicable and reliable method of obtaining and handling gasoline requires the maintenance by the operating company of storage facilities capable of accommodating gasoline in carload or bargeload quantities; because gasoline may be purchased in such quantities direct from the producers at a lower cost than would be paid by the public for small quantities, and such economy in purchasing is sufficient to materially lower the final transportation cost to the public (R. 47). It is desirable as an operating proposition that such storage facilities be not more numerous than necessary, because of the expense of installation and maintenance of facilities, and the cost of acquiring or leasing sites for the location of such storage,

all of which expenses become a part of the final transportation cost (R. 47). It is necessary that such storage facilities should be located at strategic points, with reference to the routes traversed by the motor buses; and where such strategic locations also have water transportation available the saving in transportation charges is increased, by reason of the fact that water transportation is cheaper in itself, and because the availability of water competition tends to reduce the competitive railroad rates (R. 47, 48). It is, therefore, particularly necessary that, wherever circumstances permit, storage facilities should be set up where water transportation is available (R. 48). It is further necessary to efficiency that the Company should exercise supervision over the quality and grade of the gasoline used by it, and should see that such gasoline is not only of the proper grade, but also uniform; because, variations of grade and type of gasoline cause an important increase in cost in the course of a year, in the case of a motor carrier of the type of the appellee, operating in excess of six million miles per year (R. 48). It is impracticable, from an accounting and operating point of view, to permit the casual purchase of gasoline for the use of a bus in the course of a journey (R. 48).

Variations from proper operating practices have the effect of increasing the cost of motor fuel, and ultimately increasing the cost of transportation furnished; and such variations also adversely affect the regularity, safety, reliability and convenience of such transportation (R. 48). The casual purchase of fuel along the roadside at retail creates delays; while the carrying in the tanks of the buses of insufficient quantity of gasoline is likely to result in an increased number of road failures (R. 48). Either of

the above alternatives would tend to increase the cost of the transportation; and to affect the passengers with increased cost, and with the inconvenience, annoyance and loss due to incidental roadside delays and trouble, and loss of connections at destinations (R. 48). Such irregularity and lack of convenience in transportation would cause damage to appellee itself, through loss of business and good will resulting from inferior service, and would further subject the Company to risk of loss of its certificates of convenience and necessity and operating rights by reason of failure to operate upon the same in a proper and convenient manner (R. 48).

The filling of gasoline tanks in buses at roadside filling stations, in a casual manner, also constitutes a risk to the passengers on such bus, because of the inherent danger of handling gasoline and the hazard of fire caused by static electricity (R. 48, 49). Because of such danger, the Company makes it a rule to fill the tanks of its buses only at times and places when there are no passengers in the bus (R. 49).

With particular reference to its operations between Memphis and St. Louis, and between Memphis and Jonesboro, Arkansas (which routes include all of its operations within the State of Arkansas), the Company maintains major gasoline storage facilities at Memphis, Tennessee, and St. Louis, Missouri (R. 49). Each of these cities offers water transportation, and is strategically located with respect to the routes traveled by the appellee's buses (R. 49). In April, 1934, the Company maintained storage facilities at Caruthersville, Missouri, which is also a river point, but these facilities were found to be uneconomical, and are not being used at this time (R. 49). If it were

found necessary to resume their use, such use would have the effect of increasing the operating cost, and consequently the cost of transportation (R. 49). While it is physically possible for the Company to create and maintain gasoline storage facilities within the State of Arkansas, from an operating point of view it is uneconomical to set up such facilities at any point within such State (R. 52). There is no point within the State of Arkansas, on any of the routes traversed by the Company within that State, which offers advantages for the efficient purchase and storage of gasoline, or where the acquisition or maintenance of storage facilities would not be a useless expense and a waste of the money involved (R. 49).

At this time, all of the buses of the Company operated between Memphis and Jonesboro, and Memphis and St. Louis, will run approximately five miles for each gallon of gasoline consumed (R. 49). The Company is accustomed to put into the tanks of its Memphis to Jonesboro buses, and into its Memphis to Blytheville and Caruthersville local buses, an amount of gasoline sufficient to transport the bus to its destination and return, with a reasonable margin for safety (R. 49, 50). In April, 1934, the Company was accustomed to send out its Memphis to St. Louis buses with a quantity of gasoline in the tank sufficient to carry the bus to Caruthersville, where the supply was renewed for the remaining journey to St. Louis; and the St. Louis to Memphis buses were filled at St. Louis (R. 50). At the present time, however, tanks are filled in Memphis and St. Louis (R. 50).

At this time, those motor buses operated by Dixie Greyhound Lines, Inc., from Memphis into and through the State of Arkansas, are accustomed to reach and enter the

State of Arkansas, whether from Memphis or from St. Louis, with an amount of gasoline in the tanks of such buses exceeding twenty gallons (R. 51). It is necessary, from the operating point of view, that more than twenty gallons of gasoline be in such tanks when the buses reach the State of Arkansas because such buses cannot operate from Memphis to Jonesboro and return upon twenty gallons of gasoline and, while such buses can actually traverse the State of Arkansas on the route between Memphis and St. Louis, without expending an entire twenty gallons, such twenty gallons are insufficient to carry the bus the entire distance between Memphis and Caruthersville, Missouri, at which two points storage facilities are available (R. 51, 52).

As of the date of the affidavit proof, gasoline was selling at the refineries for five cents per gallon, to which cost should be added freight to the point of storage (R. 50). Rail freight from Oklahoma points to Memphis (with respect to which particular freight transportation Memphis has no shipping advantage over other points in its immediate vicinity) is $.0218 per gallon (R. 50, 53). The freight rate on gasoline from New Orleans to Memphis by rail or water is $.15 per hundred pounds, which is equivalent to ninety-nine one-hundredths ($.0099) cents per gallon (R. 53). The freight rate by rail from New Orleans to both Jonesboro and Blytheville, Arkansas, is twenty-six and one-half ($.265) cents per hundred pounds, or one and three-quarters ($.0175) cents per gallon (R. 53).

The Company pays to the State of Tennessee a tax of seven ($.07) cents per gallon, and an additional inspection fee of four mills per gallon, on all gasoline placed by it in storage facilities at Memphis, Tennessee, regardless

of whether such gasoline is used in the State of Tennessee or not, the fact of storage in that State making such gasoline liable for this tax (R. 50). The Company also pays to the State of Missouri a tax of three ($.03) cents per gallon on all gasoline placed by it in storage in its facilities in that State, whether such gasoline is used in the State of Missouri or not (R. 50). All gasoline which is carried into the State of Arkansas in the tanks of motor buses owned by Dixie Greyhound Lines, Inc., has been taxed by, and the tax paid to, either the States of Tennessee or Missouri (R. 50).

Caruthersville, Missouri, the first river point north of Memphis on the Memphis-St. Louis bus route, is 105.2 miles distant from Memphis, according to the mileage log of the Company, which mileage log is compiled from mileage readings taken over the actual route which the buses traverse, and which route includes the distance covered in traveling through cities and off the main highways to serve points not located upon such highway (R. 50).

At the time of the hearing, the Company was operating two scheduled trips daily in each direction between Memphis and Jonesboro, Arkansas; three scheduled trips daily in each direction between Memphis and St. Louis; two scheduled trips daily in each direction between Memphis and Blytheville; and one scheduled trip daily in each direction between Memphis and Caruthersville, Missouri (R. 51).

Buses operated by the Company between Memphis and Blytheville, Arkansas, and Memphis and Jonesboro, Arkansas, are afforded time after their arrival at their respective termini and prior to beginning a return trip

over the route, and before passengers are permitted to enter the bus, to refill gasoline tanks at those points, if and provided the Company had available facilities for storing or obtaining gasoline at Blytheville or Jonesboro (R. 52). If Company storage facilities were maintained at Blytheville and Jonesboro, the gasoline available to the buses at those points could be controlled as to quality, etc., as is the gasoline available at Memphis or other major storage points; but if such gasoline were obtained at Blytheville or Jonesboro, from outside parties, such control would not be practicable (R. 52).

Motor cars designed for pleasure use generally have a gasoline tank capacity of less than twenty gallons; while commercial equipment of more than the smallest size is habitually equipped with gasoline tankage holding in excess of twenty gallons, the actual capacity varying with the type of equipment for which it is designed (R. 50, 51).

In no single instance can the buses of Dixie Greyhound Lines, Inc., run from Memphis to their termini and return, or from Memphis to the nearest gasoline storage facilities of the Company, on twenty gallons of gasoline (R. 51).

In addition, it is to be taken as a fact, because alleged in the bill and admitted in the answer (R. 10 and 20), that demand is being made upon Dixie Greyhound Lines, Inc., by the Commissioner for payment of Arkansas gasoline tax on all gasoline in excess of twenty gallons brought into the State in the tanks of its buses, under threat of the penalties provided by the Acts in question.

## SUMMARY OF ARGUMENT.

I. If Act 11 of 1934 is construed and applied in such manner as to impose the tax upon every gallon of gasoline, in excess of twenty gallons, brought into the State of Arkansas in the fuel tanks of vehicles in the course of transporting passengers in interstate commerce, without regard to whether such gasoline is used or to be used within that State, the tax so imposed constitutes a direct burden upon an instrumentality of interstate commerce and therefore upon such commerce itself and, to the extent that it is purported to be levied upon gasoline used or to be used on the highways of other states, is void because in conflict with the Commerce Clause of the Federal Constitution.

II. The exception to the above stated general rule, that a state may levy a privilege tax upon an interstate carrier as compensation for the privilege of use of the highways of the state, has no application in this case; because such a privilege tax for the use of the highways may be levied only as compensation for such use and must bear some reasonable relation to the use of the highway, and the tax as herein sought to be imposed bears no relation whatever to such use.

III. Assuming the validity of Act 11 of 1934 under the Commerce Clause of the Federal Constitution, the result reached by the Circuit Court of Appeals is correct and its decree should be affirmed, because the application of the tax to every gallon of gasoline in excess of twenty gallons, brought into the State in the tank of any vehicle, is contrary to the express terms of the Act itself, which

limits the tax to gasoline brought into the State for sale or use therein.

IV. With particular reference to the argument on behalf of the appellant:

1. The tax here levied is in fact not a privilege tax levied as compensation for the privilege of using the highways of Arkansas, and is therefore void as against this interstate carrier.

2. Act 67 of 1933, if otherwise invalid with respect to gasoline not to be used on the roads of Arkansas, is not to be supported on the ground of necessity or convenience.

3. The Circuit Court of Appeals was correct in its appraisal of Interstate Transit, Inc., v. Lindsey.

4. Bingaman v. Golden Eagle Western Lines, is not a controlling authority in this case.

## ARGUMENT

### I. The Tax, as Imposed, Constitutes a Direct Burden Upon Interstate Commerce.

It is our basic contention that these Arkansas gasoline tax statutes, if construed to impose the State tax upon every gallon of gasoline in excess of twenty gallons brought into that State in the tanks of motor vehicles while engaged in interstate journeys, and without regard to whether such gasoline thus sought to be taxed is to be used within the State of Arkansas or not, impose a direct burden upon interstate commerce and are therefore in conflict with the Federal Commerce Clause.

The fact that a burden is here imposed upon interstate commerce, and that such burden is direct, appears almost too clear for argument. The appellee is shown without dispute to operate within the State of Arkansas over certain specific and certificated routes. These routes are: From Memphis, Tennessee, into and through Arkansas, and thence to St. Louis, Missouri, and return, over United States Highway No. 61; and from Memphis, Tennessee, to Jonesboro, Arkansas, and return, over United States Highways Nos. 61 and 67 (R. 46, 47). All of the motor buses of appellee which enter the State of Arkansas on these routes are interstate carriers, and most of the passengers carried are on interstate journeys (R. 47).

The Commissioner, in demanding payment of the gasoline tax on each gallon, above twenty gallons, in every tank, merely because it is *brought into the State* and without any regard to whether it is to be used in Arkansas, says to the appellee, in effect, that it has the choice between (1) entering the State in every case with less

than twenty gallons, (2) paying the tax on all over twenty gallons, regardless of place of use, or (3) being arrested and fined. Each one of these alternatives, even the third one, involves a burden upon interstate commerce.

If the Company elects to enter Arkansas with less than twenty gallons in each tank, it is in undisputed evidence (R. 51) that "*in no single instance can the buses of the Company run from Memphis to their termini and return, or from Memphis to the nearest gasoline storage facilities of the Company, on twenty gallons of gasoline.*" Such a condition will of course result in the buses running out of gasoline on the highways in the course of their journeys unless (1) storage facilities are set up in Arkansas, or (2) gasoline is bought en route. It is in evidence without dispute that storage facilities in Arkansas are unnecessary for any other reason, are expensive and wasteful, and that gasoline prices therein would be higher because of higher freight rates; and it is further in evidence that casual purchase of gasoline along the way is impractical, inefficient, expensive and dangerous. Necessarily, then, any attempt by the Company to adopt the first alternative, and to enter the State with less than twenty gallons in tanks, must result in a burden upon the interstate operation, either by creating delay, inconvenience and hazard to the passengers, or by increasing the cost of transportation which the passenger must ultimately pay.

If the Company adopts the second alternative and elects to pay the tax on all over twenty gallons (otherwise conducting its operations in a normal and efficient manner), the existing cost of the interstate transportation is directly increased by the addition of the tax thus collected, and interstate commerce is to that extent directly burdened.

Even should the Company elect to refuse payment on gasoline over twenty gallons, its vehicles will be stopped and fines imposed, thereby creating direct inconvenience to the traveling public, and increased expense to the Company, which expense becomes part of the cost of service.

Thus, *no matter what the Company may do in the face of the demand made on it by the Commissioner, interstate commerce will be burdened.* If the Company pays the tax demanded, it certainly goes without saying that the burden is direct; the tax is simply added to present costs. And, as appears above, even the attempt to avoid this burden results in other direct burdens, in the form of immediate inconvenience, danger or ultimate expense to the interstate passenger.

It is, of course, fundamental that regulation of interstate commerce is a matter for Congress exclusively; this Court has said, in *Leloup v. Port of Mobile*, 127 U. S. 640, at 648, 32 L. Ed. 31, S. Sup. Ct. 1380, that

> "*No State has the right to lay a tax on interstate commerce in any form*, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress." (Emphasis ours.)

This power vested in Congress embraces within its control all the instrumentalities by which interstate commerce may be carried on. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826. These

principles are settled, and multiplication of authority would serve no useful purpose; but other well known cases are:

*Phil. & Read. R. Co. v. Pennsylvania*, 82 U. S. 177, 21 L. Ed. 146;
*Ozark Pipe Line v. Monier*, 266 U. S. 555, 69 L. Ed. 439, 45 Sup. Ct. 184.

It has been held in the case of *Helson v. Kentucky*, 279 U. S. 245, 73 L. Ed. 683, 49 Sup. Ct. 279, that any tax, exacted as the price of the privilege of using an instrumentality of interstate commerce, is invalid. That case, which involved a Kentucky statute levying a tax on gasoline used in the State, bears a striking resemblance to the case at bar in the practical situation surrounding the controversy. The plaintiff operated a ferry boat across the Ohio River between Illinois and Kentucky points. The State of Kentucky undertook to impose its tax upon gasoline bought in Illinois and used in propelling the ferry boat across the river in its interstate journeys. In declaring such tax void as so applied, this Court says (at 252):

"The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat would represent an exact parallel. And is not the fuel used in propelling the boat an instrumentality of commerce no less than the boat itself? *A tax which falls directly upon one of the means by which commerce is carried on directly burdens that commerce.* If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than a

repetition to say that such a tax *cannot be laid upon the use of a medium by which such transportation is effected.*" (Emphasis ours.)

The applicability of the Helson case to the case at bar is obvious. In each instance the State meets the carrier as it crosses the State line in the course of an interstate journey, and threatens that unless a tax is paid on the gasoline contained in and being used to propel the interstate vehicle, certain penalties will be imposed. Disregarding for the moment the condition that the bus enters the State on a public highway, rather than a navigable river (the effect of which variation will be hereafter considered), the Helson case would appear to establish that the imposition of a gasoline tax on fuel contained in and propelling a vehicle engaged in an interstate journey is a tax upon the means by which commerce is carried on, which in turn constitutes a direct burden upon the commerce itself.

In the progress of this case through the two lower courts, there has been so much misconstruction by the Commissioner of our use of the Helson case that we trust the Court will pardon what may be a laboring of our point with respect to that decision.

In the view of the appellee, the Helson case, by reason of the very close and practical analogy between its facts and those of the case at bar, establishes definitely and beyond question the legal proposition that *the attempted assessment of a tax upon gasoline, as the same is being brought into the State in a fuel tank of an interstate carrier, is a burden laid directly upon an instrumentality of interstate commerce, which in turn is a direct burden*

*upon the commerce itself.* In view of the Helson case, *the Commissioner cannot claim that this tax on gasoline is not in fact a burden on interstate commerce; and he cannot claim that the burden is not direct.*

There are certainly matters to be considered in this cause beyond the scope of the Helson case; there is the further question of whether the Commissioner can support this tax as coming within any exception to the "general" rule that a State may not directly burden interstate commerce. But, after having hereafter discussed that possible exception and shown that it has no application here, we may again revert to the Helson case *as the decision which unquestionably makes that general rule fully applicable to our particular facts.*

The appellee naturally does not contend that all interstate commerce is to be completely exempt from all forms of taxation; there are numerous taxes which have been declared lawful, but which ultimately affect interstate commerce in some degree, or increase the cost of the business thus being carried on. This situation has recently been reviewed by this Court in the case of *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823, 58 Sup. Ct. 546. After first referring to certain types of taxes that have been approved, the Court goes on to say (page 255):

> "All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. *The vice characteristic of those which have been held invalid*

*is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed,* Fargo v. Stevens, Michigan, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888; Philadelphia & S. M. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200; Galveston, H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo & Co., 223 U. S. 298, 32 S. Ct. 218, 56 L. Ed. 445, *or added to,* Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295; Fisher's Blend Station, Inc., v. State Tax Commission, 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956, *with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.* See Philadelphia & S. M. S. S. Co. v. Pennsylvania, supra, 122 U. S. 326, 346, 7 S. Ct. 1118, 30 L. Ed. 1200; State Freight Tax, 15 Wall. 232, 280, 21 L. Ed. 146; Bradley, J., dissenting in Maine v. Grand Trunk Railway Co., 142 U. S. 217, 235, 12 S. Ct. 121, 163, 35 L. Ed. 994. Cf. Pullman's Palace-Car Co. v. Pennsylvania, supra, 141 U. S. 18, 26, 11 S. Ct. 876, 35 L. Ed. 613. *The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove.* Baldwin v. G. A. F. Seelig, 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 101 A. L. R. 55.

"It is for these reasons that a state may not lay a tax measured by the amount of merchandise carried in interstate commerce, State Freight Tax, supra, or upon the freight earned by its carriage, Fargo v. Stevens, supra; Philadelphia & S. M. S. S. Co. v. Pennsylvania, supra, restricting the effect of State Tax on Railway Gross Receipts, 15 Wall. 284, with which compare Miller, J., dissenting in that case at page 297, 21 L. Ed. 164. Taxation measured by

gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229; Maine v. Grand Trunk Railway, supra; Cudahy Packing Co. v. Minnesota, supra; United States Express Co. v. Minnesota, 223 U. S. 335, 32 S. Ct. 211, 56 L. Ed. 459, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair, Fargo v. Michigan, supra; Galveston, H. & S. A. R. Co. v. Texas, supra; Meyer v. Wells, Fargo & Co., supra, with which compare Wisconsin & M. R. Co. v. Powers, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in Maine v. Grand Trunk Railway, supra; Ficklen v. Shelby County Taxing District, supra; American Manufacturing Company v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084, or as a method of arriving at the fair measure of a tax substituted for local property taxes, Cudahy Packing Co. v. Minnesota, supra; United States Express Company v. Minnesota, supra; cf. Postal Telegraph Cable Co. v. Adams, supra; see McHenry v. Alford, 168 U. S. 651, 670, 671, 18 S. Ct. 242, 42 L. Ed. 614, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 15 S. Ct. 896, 39 L. Ed. 1043; cf. Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 17 S. Ct. 532, 41 L. Ed. 953, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. Fargo v. Michigan, supra.

*In the one case the tax reaches only that part of the commerce carried on within the taxing state; in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business is conducted.*" (Emphasis ours.)

The language emphasized is pertinent to the practical conditions of the case at bar; and the anticipated evil, to which that language was directed is potentially present here. That evil is the possible levy by any and every state of the same tax upon the same interstate commerce. In the case at bar, gasoline, while in actual use in interstate commerce and in such use held to be an instrumentality of such commerce, is sought to be taxed *if merely brought within the taxing State*, and without regard to its use there or elsewhere. If such a tax can lawfully be imposed by Arkansas, it can be imposed by every other State through which the vehicle may pass. This will give rise to a situation wherein the same instrumentality of commerce may in theory be taxed by all forty-eight states, and where in practice it will be taxed by enough of those states to increase many times its cost as an element of transportation expense. To visualize what can and undoubtedly will happen, one has only to recall the great number of states, especially in the northeastern section of the country, whose borders would be crossed by a motor carrier operation no longer than that conducted by the appellee between Memphis and St. Louis. To give only one example, the distance is about the same as that from New York City to Richmond over Highway U. S. No. 1; the latter operation would involve six states and the District of Columbia. We therefore submit that the tax on this instrumentality of commerce contended for

by the Commissioner is a perfect example of that cumulative burden to which the Court has referred.

Then, assuming appellee's proposition, that the imposition of this tax in the manner demanded by the Commissioner is an actual, direct and prospectively cumulative burden on interstate commerce, is that tax to be saved from consequent invalidity on the ground that it is a privilege tax levied upon the interstate carrier for the privilege of use of the State's highways?

## II. The Tax Is Not to Be Supported as a Privilege Tax for the Use of the State Highways.

It is recognized that the State may impose upon an interstate carrier a privilege or license tax as compensation for the privilege of using the highways of the State. This exception to the more general rule that a State may not impose a tax directly burdening interstate commerce, has been the essence of the Commissioner's case to the present time, and has consistently been urged by him, but always without reference to those very definite conditions which must be present before even such a privilege or license tax can meet the tests of validity laid down by this Court.

As we conceive it, the rule is that, while a State may levy upon the interstate carrier a privilege or license tax, which is a direct burden upon interstate commerce, for the privilege of using the highways of the State, such a tax may be levied *only as compensation for the use of such highways, must bear a reasonable relation to the use of those highways, and must be predicated upon the use made or to be made thereof. There must be such a*

*relation between the measure employed and the extent or manner of use as to justify the conclusion that the tax is a charge made merely as compensation for the use of the highways.*

The above is the rule established by this Court in the case of *Interstate Transit, Inc., v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 51 Sup. Ct. 380. The State of Tennessee had there imposed a privilege tax upon interstate buses, graduated according to passenger-carrying capacity. In holding that tax invalid, this Court said :

> "As such a charge is a direct burden on interstate commerce, *the tax cannot be sustained unless it appears affirmatively in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic.* This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551, or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612, 35 S. Ct. 140, 59 L. Ed. 385; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252, 48 S. Ct. 230, 72 L. Ed. 551. Compare Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51, 17 S. Ct. 298, 71 L. Ed. 530. *But the mere fact that the tax falls upon one who uses the highway* is not enough to give it presumptive validity." (P. 186.)
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> "But since a state may demand of one carrying on an interstate bus business only fair compensation for

what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. *Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state.* Clark v. Poor, supra. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses." (P. 190.) (Emphasis ours.)

This Court has since reaffirmed the proposition that, to justify a money payment burdening interstate commerce, it must affirmatively appear that the payment is demanded as reimbursement for the expense of providing facilities, etc. *Morf v. Ingels*, 300 U. S. 290, 81 L. Ed. 653, 57 S. Ct. 439. The Lindsey case has also been cited with approval in *Aero Mayflower Transit Co. v. Georgia Commission*, 295 U. S. 285, 289, 79 L. Ed. 1439, 55 Sup. Ct. 709, and in *Morf v. Bingaman*, 298 U. S. 407, 410, 80 L. Ed. 1245, 56 Sup. Ct. 756.

It appears, therefore, to have been established that a State may not impose such privilege taxes, which are a direct burden on interstate commerce, and justify them as being compensation for the use of the highways, "unless it appears affirmatively" that the tax is levied *only*

as compensation, that the charge made is predicated upon the use made, and that such charge bears a reasonable relation to the use.

The Circuit Court of Appeals took the position that this case is ruled by Interstate Transit, Inc., v. Lindsey (R. 71), and we submit that the Court of Appeals was entirely correct in that view. In the light of the rule laid down in that case, *it does not matter whether the tax here in question is or is not a privilege tax for the use of the highways; because, even if it is such a tax, there is absolutely no relation whatsoever between the tax collected and the use to be made of the highway, and the tax is not predicated on such use.*

Consider the practical situation. The State of Arkansas meets the interstate carrier at the State line and demands that it pay 6½ cents tax on every gallon of gasoline in excess of twenty gallons then contained in the tank. It does not matter how large or small the vehicle may be, nor how heavy or light, nor whether it is traveling a great or short distance. In the entire transaction, the extent of the carrier's use of the roads *will not even be asked.* The only single fact that counts at all, in fixing the amount collected for the alleged "use," is the number of gallons in the tank; the sum thus collected bears no relation whatsoever to the use of the roads, either as to distance traveled or weight damage inflicted. The same vehicle, with the same number of passengers or the same freight, traveling the same road to the same destination on successive days, may pay an entirely different sum. The appellee's own buses are called upon to pay one rate of tax while going north from Memphis to St. Louis, but another rate of tax when the very same bus travels south from St. Louis to

Memphis over the same identical stretch of highway; not because of any difference in use of the road, but merely because the St. Louis-Memphis bus has consumed more fuel in reaching the Arkansas State line. The careful operator, coming into the State with contents of his tank closely gauged to the work in hand, will make liberal use of the Arkansas roads, and pay little or nothing; but some person ignorant of the law may blunder across the State line with a full tank, on a trip of perhaps a few miles, and be assessed on the entire contents of his tank over twenty gallons, when nearly all of those contents will be carried out of the State again, unused. And that same person, wiser by experience, can return with the same vehicle into the State the next day, and operate over the same route, but pay nothing. The State does not ask where he is doing, or how large or heavy his vehicle may be; the State does not care whether the actual use of its roads be great or small. It asks the operator just one question: "How much in your tank?" If there is much, you pay much; if there is little, you pay little (or nothing). Yet the destination and vehicle may be the same in each case, or the man with the light tank may be traveling much farther. As if to render the confusion more complete, the State exacts this tax, "levied as compensation for the use of the roads," upon industrial and non-transportation users of gasoline; and adds *discrimination* to chaos by exempting as a class all pleasure vehicles (whose tanks hold less than twenty gallons) while demanding the tax of commercial users. *The whole thing is completely haphazard, and in no manner whatever related or apportioned to the degree of use to be made of the highway.*

If the State, in the collection of this gasoline tax, does not even ask or need to know whether the fuel on which it levies is to be used on its roads or not, how can it be said that the tax is "predicated" on such use? If this tax is predicated on any use of highways, then the State, as the Court of Appeals points out (R. 73), is imposing a tax, not only upon the interstate commerce carried on within its own borders and over its own roads, but even upon such commerce carried on within other states to which this gasoline is carried in the course of the interstate journey.

We emphasize that in the discussion of the application of the Lindsey case we have assumed, as the Circuit Court of Appeals assumed without deciding, that the Arkansas statutes purport to impose a privilege tax for the privilege of using the highways. That is the utmost which the Commissioner can claim. Even with that assumption, we have a tax which is actually a burden on interstate commerce, and which cannot be defended as compensation demanded from an interstate carrier for use of the roads, because the tax has no relation whatever to such use. We submit, therefore, that assuming the strongest ground which the Commissioner can take, the action of the Circuit Court of Appeals was correct.

## III. The Application of the Tax to All Gasoline Brought Into the State Is Contrary to the Express Terms of the Statute Itself.

In the discussion of this topic, we disregard all that has heretofore been said, and assume that the tax is not invalid as in conflict with the Commerce Clause. Nevertheless, though the State be conceded to have the power

which the Commissioner claims, the State has not purported to exercise such power, and has not authorized, even in the terms of its statutes, the position taken by the Commissioner. Hence the action of the Circuit Court of Appeals (though not based on such proposition, which that Court had no reason to consider), is nevertheless correct.

As a preliminary to our discussion of the terms of the statutes themselves, we here set out for convenience all of the provisions of Act 11 of 1934 which appear to have any bearing on this question. Act 67 of 1933 is of no assistance in this respect. It simply prohibits bringing gasoline into the State until the "tax" thereon has been paid, without purporting to say what the "tax" may be; the actual "tax" is defined and levied by Act 11 of 1934.

Act 11 of 1934 contains the following provisions, wherein we emphasize the pertinent language:

"Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"'*There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel* as defined in this Act, sold or *used in this State* or purchased for sale or *use in this State.*'"

"Section 25. Section 2 of Act No. 63 of the General Assembly approved February 25, 1931, is amended to read as follows:

"'Section 2. The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, *or the use, when used in this State;* double taxation is not intended. Motor vehicle fuel manufactured, produced or compounded in or imported into this State and subsequently sold for exportation, is not taxable.

"'The tax herein levied is to be collected at the source in this State of the manufacturer or wholesaler when sales of any motor vehicle fuels are made, and when not sold in this State, then when first brought into this State *for use herein*. Provided that notwithstanding any provision or provisions contained in this Act to the contrary, no person, firm or corporation who manufactures motor vehicle fuel in this State from crude oil and its derivatives shall be required to pay or collect the tax imposed by this Act on any such motor vehicle fuel that said person, firm or corporation sells and ships to the purchaser in a railway tank car. This provision, however, shall not relieve any person, firm or corporation from making reports to the Commissioner of Revenues showing the amount of motor vehicle fuel sold in railway tank cars, and the tax upon such motor vehicle fuel so shipped in railway tank cars shall be collected and paid by the person, firm or corporation which purchases the motor vehicle fuel which is shipped in a railway tank car.'"

"Section 27. Nothing in this Act or in any similar law on the subject shall be construed as intending to levy any tax on motor vehicle fuel that the State has no power to tax."

"Section 28. The tax of six and one-half cents per gallon herein provided for is levied and shall be collected, under such rules as may be promulgated by the Commissioner of Revenues for ascertaining the quantity of such motor vehicle fuel, on all motor vehicle fuel purchased in other states and *used in this State* in propelling motor vehicles on the public highways moving in interstate or foreign commerce in all instances *where such tax is not a burden on such interstate or foreign commerce* and such tax may be lawfully collected by this State." (R. 7-8.)

In discussing the construction of these Acts, we premise both a legislative intent and a constitutional power to tax

gasoline thus brought into the State in interstate buses, and confine ourselves to a consideration of the extent to which the Legislature intended such a tax to go. There is no Arkansas decision on this point, to the best of our knowledge; the question of interpretation is open. We desire to note that consideration of this question should be had in the light of the well recognized rule that "in the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." Gould v. Gould, 245 U. S. 151, 62 L. Ed. 211, 38 Sup. Ct. 53.

Observe that (Section 22) the tax is an excise on the *sale or use in the State;* the purpose of the Act (Section 25) is stated to be the collection of the tax on the *use, when used in the State;* and such tax (Section 28) is to be collected on gasoline bought in other States and "*used in this State in propelling vehicles on the public highway*" in interstate commerce, *provided there is no burden on such commerce.* Wherever *use* is spoken of, it is *always* coupled with the qualification "in the State." Section 28 is particularly clear. It speaks of gasoline "used *in this State* in propelling motor vehicles." In other words, this clearly indicates that by "use" the Legislature meant the ultimate purpose for which gasoline (as motor fuel) is intended, viz., exploding in a motor to furnish power.

Gasoline is not *used* by being carried about in a tank, any more than a lump of coal in a railroad engine tender

is *used* by being carried over the railroad. It is no more *used* in this sense than it is used while still piled in the coal yard. Such coal or gasoline is *ready* for use, but it is not *used*, and does not perform the function for which it was purchased, until it gives up its power in the form of heat. Such is the common sense meaning of "use," as applied to gasoline; and we submit that nothing in this Act points to any different meaning in the legislative mind.

The Commissioner, arguing for a legislative intent to extend this tax to all gasoline in fuel tanks, without regard to place of use, necessarily admits that the Legislature must then also have intended the existence of all of those anomalies and absurdities in the incidence of the tax, which we have already in this brief pointed out. If the Legislature intended to tax all gasoline regardless of place of use, then it must also have intended such freakish results as that a small truck with twenty-five gallons in the tank may traverse the whole width of the State for a tax of $0.32, while a vehicle with ninety gallons aboard may not run from Memphis to West Memphis and return (20 miles) without paying $5.45 for this doubtful privilege.

Certainly, in an Act which cannot stand at all against interstate carriers except as an attempt to collect compensation for the use of the highways, the Legislature may not reasonably be considered as intending to produce anomalies which, by their very existence, would expose the tax to great danger of complete invalidity.

It is submitted that, even if the tax be constitutional, the Commissioner's position is indefensible under the terms of the statutes, and that the action of the Circuit Court of Appeals is to be affirmed.

**IV. (1) The Tax Is Not a Privilege Tax Levied as Compensation for the Privilege of Using the Highways.**

In all of the preceding topics we have constantly assumed that the tax herein was a privilege tax for the use of the highways. However, in reply to the appellant's effort to establish for the tax a character thus far assumed, we may show that the tax in question is actually not of the character which the Commissioner claims.

As a means of possibly foreclosing any consideration of the point by this Court, appellant urges that the Circuit Court of Appeals "held" this tax to be a privilege tax for the use of the highways. We submit that the Court did not pass upon such question at all, because it had no occasion to do so. The only reference in the matter in its opinion will be found at page 70 of the record. Of course, as the Court of Appeals says, this is a tax for "highway purposes," because the revenues are segregated for that purpose; but this would be equally true if the gasoline were taxed specifically as property and the revenue segregated for highway use. A tax merely for highway purposes is not at all the same thing as a tax levied as compensation for the use of the highways, which appellant *must* establish in this case, before he can bring his argument up to the point where *Interstate Transit, Inc., v. Lindsey* defeats it.

With respect to the case of *Sparling v. Refunding Board*, the Court of Appeals says:

> "The decision of that (the Arkansas) Court is controlling as to the *meaning and extent of the requirements of the taxing act.*" (Emphasis ours.)

The Court of Appeals merely gives effect to the accepted rule that the Federal Courts are bound by the decision of the highest State Court with respect to the interpretation or construction of State statutes. With this position we do not disagree.

But when the meaning and requirements of this Act, as defined by the Arkansas Supreme Court, are examined, it becomes clear that the Arkansas Court has so construed the statute as to be quite inconsistent with the only type of privilege tax which would help the appellant in this case.

We will not attempt to follow the Arkansas Court through the confusing language of its opinion, or to prove the very probable fact that it had in view no such purpose as the setting up of a "privilege tax as compensation for the privilege of using the highways." It will be sufficient here to show that the tax, as its meaning, extent and requirements are defined by the Arkansas Court, *cannot be that privilege tax levied on an interstate carrier as compensation for the privilege of using the roads*, which alone would suffice to bring the appellant face to face with the Lindsey case.

What the Arkansas Court has done is so to define the meaning and extent of the requirements of the Act 11 of 1934 as to set up for the State of Arkansas a *general*

privilege tax *upon all uses of gasoline within the State*—a tax which requires payment from every person using such gasoline, *without regard to the type of use and particularly without regard to whether such gasoline be used on the highways.* The tax is exacted from the users of stationary engines on remote levee jobs, from the users of farm machinery, and from the users of airplanes in flight; it is also to be exacted from the operators of cleaning plants in which gasoline is a cleaning agent, and from persons who may use it as fuel in kitchen stoves. No use whatever in the State is exempt. But, we submit, when the State of Arkansas, through its Supreme Court and its Revenue Department, actually does apply this tax to all uses of gasoline within the State, then in fact and law the Arkansas gasoline tax *is a general privilege tax upon all uses of gasoline in the State and cannot be that restricted form of tax here claimed by the Commissioner*, to-wit, a privilege tax levied as compensation for use of the highways. The tax cannot be both general and all-inclusive, and yet restricted to the only privilege for which an interstate carrier can be charged. Benefits from the two classes of tax, accruing to the State, are mutually exclusive; the State may impose the type of tax which will take the money of the industrial and non-highway user of gasoline but, because such a tax cannot possibly be defended as a tax levied as compensation for use of the highways, an interstate carrier does not pay it. The converse situation was open to the State; it could have passed a privilege tax for the privilege of using the highway, in which case the carrier would pay, with other highway users, but the industrial and non-highway users would escape. This case arises out of the unwillingness of the State to admit the limitations of its own accepted plan of taxation.

The appellant attempts to take this general privilege tax and, by the use of certain words of the Arkansas Court susceptible of more than one interpretation, to apply the general tax to an interstate carrier which, without those words, would be clearly exempt. The words in question do not purport to *change the nature* of this tax, which is *at all times applicable to all uses* of gasoline in Arkansas; they merely place a *characterization* or *"label"* on the tax, *misdescriptive of the goods.*

It is well established that this Court is not bound by any characterization of a tax on the part of the State Court but, for the purpose of determining and protecting the constitutional rights of the citizen, it will apply its own tests. The controlling test is to be found *in the operation and effect of the law as applied and enforced by the State.*

St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 50 L. Ed. 265, 35 Sup. Ct. 99;
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297, 43 Sup. Ct. 125;
Federal Land Bank of New Orleans v. Crosland, 261 U. S. 374, 67 L. Ed. 703, 43 Sup. Ct. 285.

The operation and effect of this gasoline tax statute, as applied and enforced by the State, is that of a general privilege tax on all uses of gasoline, not that of a statute levying mere compensation for the use of the highway. Under such conditions, this Court may, and we submit that it should, disregard any contrary characterization by the Arkansas Court, and give effect to the Act as it really is. If this be done, then the Act is not such as may be imposed upon this interstate carrier, the Helson case would apply directly to the situation.

**(2) Act 67 of 1933 Is Not to Be Supported on the Ground of Necessity and Convenience.**

Appellant says (A) that Act 67 of 1933 imposes no burden on the appellee, (B) that the inconvenience and expense shown do not amount to an unconstitutional burden, and (C) that the Act can be sustained as an easily administered aid in the enforcement of the tax.

In elaborating these points, appellant does not say that he assumes that Act 67 of 1933 would otherwise be unconstitutional insofar as it affects gasoline brought in for use on the roads of other states; but it appears that such an assumption must be made, otherwise there would be no reason for advancing this type of argument at all.

A. That Act 67 of 1933 does impose burdens on the appellee has already been demonstrated in the very beginning of this argument, under our first topic: the appellee can either (1) enter the State with not more than twenty gallons (which will not in any event suffice to carry the buses between Memphis and their termini and return, or between Memphis and the nearest storage in Missouri) and thereby face road stoppages and delays, or (2) enter with over twenty gallons and pay an illegal tax, or (3) be arrested and fined, with consequent expense and delay. We repeat and emphasize that it is not the burdens imposed by these statutes on the appellee which bring about the invalidity of this tax; it is the burdens imposed upon that interstate commerce in which appellee is engaged. And we wish at this point to further emphasize, as applicable to every argument made by appellant and involving the so-called "convenience" of the State as contrasted with the convenience of the ap-

pellee, that the supposed "convenience" to the State does not involve a corresponding inconvenience to this corporation alone. We do not have here the case of a carrier transporting inanimate freight, when this carrier of passengers is physically stopped, and financially penalized, and impeded in the course of its normal business by the revenue officials of the State of Arkansas, the unquestioned hardship to appellee itself *is multiplied by the personal inconvenience and expense of the many thousands of persons who are passengers on its buses.*

Suppose that the State of Arkansas undertook to levy a privilege tax on coal sold or used in the State and, as a "convenient" method of preventing the evasion of that tax, prohibited the introduction into the State of any coal on which the tax has not been paid. Then, when the State undertook to arrest and fine all railroads bringing coal into the State in engine tenders in the course of interstate commerce, unless the tax were paid, we would have (except for the one fact that the buses use a public highway) a case identical with that at bar; as a purely practical matter, and *from the point of view of "convenience" to the State and the hardship on the carrier and its passengers,* the cases would be fully identical. And it would be of great interest to observe the reactions of counsel for appellant (a member of the legal department of the Western Association of Railway Executives) should the State of Arkansas levy such a tax upon the fuel used by his employers in interstate commerce, and justify that otherwise baldly unlawful imposition on the ground that there was no burden on interstate commerce and no substantial hardship to the railroads in having their trains stopped and their passengers delayed, and, that even if there were, it was more "convenient" for the State to handle the matter that way.

With respect to that mathematical calculation by appellant, seeking to prove that the carrier can operate under the Commissioner's demands at less cost than under the finding of the Court of Appeals, we would reply that it is in no event incumbent upon appellee to pay an unlawful tax, whatever may be the financial outcome of refusal; and that the Company is probably a better judge of the practical handling of its business than is the appellant. The doing of those things, suggested by appellant to relieve the burden of the tax, is itself a burden.

B and C. When appellant claims that the inconvenience to be suffered by the appellee and its passengers is not enough to amount to an unconstitutional burden, and that Act 67 of 1933 (presumably otherwise invalid) can be independently sustained as an easily administered aid in the enforcement of the State gasoline tax, the authorities cited for the propositions do not go far enough to cover this case.

We suggest that this Court has never held that a tax, otherwise invalid, is to be held valid merely because convenient to the State. Presumably, mere inconvenience to the taxpayer will not invalidate a valid tax; but "convenience" to the State will not put life into a tax otherwise void. The first and essential inquiry is, whether the tax is valid; and it has herein been shown that the tax, as a tax, fails to meet any of the requirements of validity. Failure to recognize this proposition is an essential defect of the appellant's entire argument with regard to "convenience."

The appellant also overlooks the fundamental rule that, in the case of privilege taxes levied upon interstate car-

riers for the use of the roads, the State can collect only in reasonable degree for what it gives. Appellant argues that, because of "convenience," the State can meet one of two carriers making identical trips over the highway and, because one of those carriers has twenty-one gallons in its tank and the other has ninety, the State can tax one carrier 6½ cents and the other $4.50. This argument is equivalent to saying that, if the tax is void under the rule of the Lindsey case because there is no reasonable relation to the use, it nevertheless becomes valid merely because the State declares its method of taxation "convenient."

We suggest also that, if the State of Arkansas can support a tax on the mere ground of its own convenience, and can succeed in having this Court tell the carrier that it must adjust its normal business methods to suit that convenience, then every other State has the same right; with the obvious result that every State will be burdening interstate commerce, each in its own peculiar way, and in accordance with its individual policies, and without regard for the possibly conflicting policies and requirements of other states, and each will be claiming that the carrier shall so conduct his business as to meet the particular requirements of "convenience" promulgated by itself. We need scarcely elaborate the complete state of confusion that would result, or the enormous cumulative burdens which would thus be imposed on interstate commerce.

Cases of the type of Aero-Mayflower Transit Co. v. Georgia Public Service Commission are premised upon the existence of a valid tax. In that case itself, the State had simply imposed a flat fee on trucks, under which a

carrier could make such use of the highway, with the licensed truck, as it desired. The license fee itself was valid and reasonable; the operator complained that his business called for many trucks to enter the State and that under the tax as existing his tax bill was disproportionately large. This Court, in effect, told the operator that, if he wanted to get his tax bill down, he should so arrange it that fewer trucks would enter the State, because there was nothing wrong with the individual tax on each truck. This is far different from permitting the State to levy a tax on each truck, in an unknown and varying amount, every time the truck came into the State.

Even if we concede the general principle of "reasonable margin to insure effective enforcement," the facts of appellant's case certainly do not justify the application of the principle here. It would be hard to find or conceive of a more unreasonable, haphazard rule for determining a tax. Furthermore, the precise question in this case is, *can the State of Arkansas impose a tax upon gasoline being brought into the State in the tanks of an interstate carrier, in the course of an interstate journey, for use on the roads of other states;* and the answer to that question will control the fate of Act 67 of 1933. If it be decided that the State has no such legal power, any or all provisions of the Act of 1933 purporting to support or give effect to such power will necessarily be of no effect.

And in concluding the topic, appellant states that the authorities cited by him support the proposition that the State may base the tax upon the "reasonable lump sum" theory expressed in Act 67. Just what "reasonable lump sum" does he mean? The amount of the tax varies with every vehicle that enters the State, and varies with each vehicle at different times and places.

**(3) The Circuit Court of Appeals Correctly Appraised and Applied the Case of Interstate Transit, Inc., v. Lindsey.**

Appellant argues that Act 67 of 1933 does not impose any tax on gasoline carried through the State for use on the roads of other states. It merely prohibits the carrying of the gasoline to the scene of use *at all* unless the Arkansas tax is first paid. And, if it be seriously claimed that the State is purporting to tax all gasoline in the tank except the twenty gallons, which it graciously permits to be carried free for use on the roads of other states, then we ask what business has the State of Arkansas in limiting the amount of fuel that a carrier may bring into a sister state which has no objection to entrance with a full tank. Its action would be no less than an attempt by Arkansas to regulate transportation in such other state.

In applying the Lindsey case, the Circuit Court of Appeals first assumed everything contended for by appellant under Sparling v. Refunding Board. The Court did not, in its opinion, require any "nicety" in relation between the tax and the use of the highway; but it did require that there be *some* reasonable relation. It found none, for reasons too clear to need repeating. As a matter of fact, when appellant indicates that the fee required in the Lindsey case was a flat fee, he is in error; it was based on seating capacity and would vary with the size of the bus. Thus; it was actually more nearly related to the use of the highway than is the case here.

We have heretofore shown it to be perfectly possible and highly probable that, if all states are to be allowed

the privilege demanded by Arkansas of taxing all gasoline brought within their borders in the course of interstate commerce, the tax on such fuel will prove to be cumulative. Appellant says that this would not be true unless the "operator aggressively willed it to be so." Apparently, all the operator has to do, in order to "aggressively will it," is to carry enough gasoline in his tank to get his vehicle to its destination.

**(4) Bingaman v. Golden Eagle Western Lines Is Not a Controlling Authority in This Case.**

The Bingaman case really has no application here at all. The principles there laid down are all conceded by the appellee. We are not asking that the Court construe the meaning or define the extent of a state statute; although we are asserting that the Court is not bound by a mere characterization which is actually a misdescription of the nature of the Act. The state statute held void in the Bingaman case was almost identical with the Arkansas Act, which fact points our question—may a practically identical Act be constitutional in one state and unconstitutional in another, merely because of what the State Court *calls* that Act? And finally, the Bingaman case does not assist the appellant with respect to surmounting the requirements of Interstate Transit, Inc., v. Lindsey.

## CONCLUSION

The case may be thus recapitulated:

1. The facts are undisputed and show that the demand of the Commissioner for this tax must necessarily result in expense to Company and public, or delay, inconvenience or danger to passengers, any one of which results in a direct burden to this interstate transportation.

2. As such a direct burden, the tax is invalid as in conflict with the Commerce Clause, unless it can be supported as a privilege tax levied only as compensation from the interstate carrier for its use of the state highways.

3. But, if purporting to be such a privilege tax, it is still invalid, because the tax thus imposed bears no reasonable relation to the use to be made of the highways.

4. And even if a valid tax and not in conflict with the Federal Constitution; the plain words of the statute itself restrict the tax to gasoline brought into the State for use in such State.

We need scarcely remind the Court of the extreme practical importance of the principle here at stake. If Arkansas can impose this tax on all gasoline brought into the State (and it does not have to grant the twenty gallon exemption), then every other state, and perhaps some cities, may do the same. A number of such statutes already exist; in Tennessee and Mississippi, to name two. If this power is established, it may be taken as certain that such exactions will multiply without limit, and

will constitute an unbearable nuisance and expense to all users of motor transportation.

It is submitted that the Circuit Court of Appeals was entirely correct in its action and in the reasons given for that action, and its decree should be affirmed.

Respectfully submitted,

WALTER CHANDLER,
J. H. SHEPHERD,
A. L. HEISKELL,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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# No. 138

---

Z. M. McCARROLL, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

*Appellant,*

*vs.*

DIXIE GREYHOUND LINES, INC.

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

---

## REBUTTAL BRIEF OF APPELLEE

---

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1939**

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# No. 138

---

Z. M. McCARROLL, Commissioner of Revenue of the State of Arkansas,

*Appellant,*

*vs.*

DIXIE GREYHOUND LINES, INC.

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

---

## REBUTTAL BRIEF OF APPELLEE

---

### Statement

We ask leave to file this memorandum for the reason that appellant, in his reply brief, makes two points not heretofore considered. These are:

1. That Appellee's point No. 3 (Brief III, p. 29) was not raised in the lower court and cannot be relied upon here. This point is that the application of the tax to *all* gasoline

(over 20 gallons) brought into the State is contrary to the express terms of the statute itself; and

2. That this contention (Brief III, as above) is without merit because Act 67 of 1933 *levies* a new tax applicable to Appellee.

We, therefore, ask the court's permission to discuss these contentions briefly.

## Summary of the Argument

I.

The question of the proper construction of the Arkansas statutes, Act 67 of 1933 and Act 11 of 1934 was raised in the trial court and Appellee's contentions again presented to that court in the petition to rehear.

This refers to pages 6 to 9 of Appellant's Reply Brief.

II.

The Arkansas Act 67 of 1933 does not levy any tax.

This refers to Appellant's reply brief pages 9 to 14.

## ARGUMENT

I.

Neither counsel representing the Appellant in this court participated in the trials in the District Court or Circuit Court of Appeals. The court should therefore excuse, *but not be misled by*, the statement that the point was not raised in the District Court. Counsel probably did not have before them Appellee's trial court brief, part II of which fully presented this question to the District Court.

While the trial briefs are not before this Court, the pleadings and proceedings in the District Court and Assignments of Error and Brief in the Circuit Court of Appeals (which are before this Court) clearly show that the question of

proper interpretation or construction of the two Arkansas statutes quoted in the bill, was raised and relied upon.

*Pleadings:*

The bill sets out Chapter 67, Acts 1933 entitled "An Act to better enforce *the Gasoline Tax*" and then sets out the pertinent portions of Act 11 of 1934 which levies "the Gasoline Tax", and provides a tax of 6½ cents per gallon on gasoline bought in other States "for * * * use in this State".

The bill then avers (and the Answer admits) that the Commissioner is construing these Acts to entitle him to collect the tax on all gasoline over 20 gallons in the fuel tanks when the bus reaches the State Line and that the imposition of the tax "would be oppressive and wrongful" for the reason that it would "restrict the freedom, convenience and safety" of interstate commerce and be "a burden" thereon.

That the bill questions the Commissioner's interpretation of the Acts is further shown by the last Section * * * thereof asking a decree (1) declaring Act 67 of 1933 "void insofar as such Act 67 purports to prohibit bringing into the State" gasoline in excess of twenty gallons, *and* (2) that insofar as Act 11 of 1934 purports to impose a tax "upon *all* gasoline in excess of twenty gallons brought into the State, * * * it is inapplicable * * *; and (3) the said tax (upon all gasoline over twenty gallons) is not properly or legally collectible under such Act from such plaintiff * * * and further (4) that *if* and insofar as the said Act 11 does or shall purport to levy or impose *such a tax*" * * * it is in conflict with the Commerce Clause.

(The numbers in parentheses are not in the bill, but the statements separated by the numbers are each connected

with the next by the conjunction "and" and "and further" as quoted.)

It has always been our contention and still is, that Act 67 of 1933 does not impose any tax but merely prohibits bringing in more than 20 gallons of gasoline upon penalty, and then provides an excuse of the penalty on condition that "the State tax" thereon is paid; and that "the State tax, the amount and to what extent it is thereon is provided elsewhere. The summation of relief asked so shows.

See Bill Secs. IV to X R. p. 6 to 10.

The answer expressly makes issue on the proper construction of the Acts by setting out the Commissioner's contention that "buses operated by the plaintiff * * * are equipped with tanks having a capacity of ninety (90) gallons, and that such tanks are filled to capacity * * * and that the amount of unused gasoline in said tanks (when the buses reach the Arkansas State line) exceeds the amount of 20 gallons and * * * (such excess) is subject to tax by the State of Arkansas" (Answer V R. p. 19).

Sections VIII and IX of the Answer must be read in connection with the contentions set forth in Section V above.

The plaintiff in the trial court said the tax was "inapplicable", "wrongful and oppressive". The defendant in the trial court said it was applicable and collectible. The issue was made and either party was at liberty to rely upon any ground to sustain its legal contentions.

**Proceedings in the Trial Court**

When the District Court delivered his findings of fact and law, the plaintiff in that Court (appellee here) excepted thereto, moved for additional findings and petitioned for a rehearing. These proceedings show that the following occurred:

In the petition for rehearing, the plaintiff in the trial court (appellee) called the Court's attention to the fact that the

Court in its opinion concludes "that the plaintiff is liable for the tax on *all* gasoline in excess of twenty gallons brought into the State of Arkansas in the tanks of its buses then engaged in interstate journeys, and without regard to whether the gasoline in such tanks is or is not to be used in propelling the vehicle upon the highways of Arkansas or upon the highways of Missouri or Tennessee" (R. p. 33); and

That the findings of the court are inaccurate and erroneous in the following respect:

> "(a) In Finding No. IX, the Court finds as a fact that when gasoline is not sold in the state "then the tax shall be collected when the fuel is *first brought into the stat;*' whereas, in point of fact the applicable language of Section 25 of the Act in question is 'when first brought into this state *for use therein*'. Yet the opinion of the Court holds such gasoline in excess of 20 gallons to be taxable when brought into the state, regardless of whether same is to be used therein" (R. p. 34).

Thus, there was clearly called to the trial Court's attention the fact that the plaintiff in that court (appellee) contended that the Act was improperly construed by the trial Court and that the proper construction was that the Arkansas tax was, in any event, collected only on gas brought into Arkansas "*for use therein*".

The same idea is again clearly set out in the motion of plaintiff (appellee) for additional findings II, III, and VI (R. p. 38, 39, 40).

The Court granted request No. VI for a correction of the Court's finding IX (R. p. 43) so as to make that finding read: "when not sold within the State or Arkansas, then the tax shall be collected when the fuel is brought into the State for use herein" (Amended, Order p. 43).

The corrected finding above and the refusal to make the additional findings requested was then made the basis of

assignment of error 7 before the Circuit Court of Appeals, as follows:

> "The Court erred in holding as a matter of law, that the language of Act 11 of 1934 is properly interpreted to levy (fol. 76) a tax of 6½ cents upon each gallon of gasoline, in excess of twenty gallons, which may be brought into the State of Arkansas in the tanks of buses of plaintiff in the course of an interstate journey, without regard to whether or not such gasoline in excess of twenty gallons is designed or intended for use, or is used, within the State of Arkansas; for the reason that Section 22 of said Act 11 of 1934 specifically provides that 'There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or *used in this State* or purchased for sale or *use in this State*,'' and Section 25 of said Act specifically provides that 'The purpose of this Act is to provide for the payment and collection of an excise or privilege tax on the first sale of motor vehicle fuels when sold, or the use, *when used in this State*; double taxation is not intended.'" (Emphasis ours.) (R. p. 57.)

There is no contention, before the Reply Brief of Appellant just filed in this Court, that the pleadings did not cover the proper construction of the Arkansas Acts, or that the Assignment of Error No. 7 was improper. Therefore, "the shoe is on the other foot". Instead of the question not having been raised, it was raised, and the pleadings treated by all parties as covering the issue.

A party cannot for the first time in this Court take the position that the pleadings are insufficient when an inconsistent position has been taken in the trial court and in the Circuit Court of Appeals.

6 Cyc. Fed. Proc. Sec. 2973.

A prayer for an injunction against the collection of any tax certainly includes any part thereof that the Court may

find illegally demanded—the whole includes the part—especially when the part has never been demanded or assessed or acceptable.

## II.

We find no objection to the authorities cited by appellant under Section B contending that the tax is collectible as to all gasoline whether for use in Tennessee, Arkansas or Missouri. Insofar as applicable, these authorities are favorable to appellee as soon to appear.

We have no contention to make with appellant in his statement that Act 67 of 1933 must be construed with Act 11 of 1934 and that neither repeals or amends the other.

We do, however, contend that the appellant's strained construction of Act 67 is wholly untenable. Perhaps this is due to counsel's losing sight of the fact that Act 67 does not tax anything. It merely prohibits bringing into the State more than 20 gallons of gasoline and then excuses the penalty provided any tax which may be levied on any or all of such gasoline by any other enactment, is paid.

Counsel refers to Act 67 as "laying the tax" (R. 11), and suggests that it "levies a tax" or lays it on all gasoline" no matter where used.

That such is a misconception of Act 67 is clear from a reading of the Act itself. Its caption shows that its purpose is "to better enforce *the gasoline tax*", not for the purpose of levying a *new* gasoline tax. Its provisions for penalty are excused if *the tax* is paid.

Counsel admits that Act 67 cannot stand alone because it does not *fix any tax*, and he therefore refers to Act 11 to find out what tax must be paid to relieve the penalty.

Again counsel falls in error by selecting one phrase from Act 11 fixing the amount of the tax without reference to what is taxed. He, in making a statutory construction, is not entitled to select one phrase and ignore the rest of the

statute. He must refer to Act 11 to see what tax has been levied, that is, the amount, the article taxed, and under what circumstances.

When Act 11 is so referred to it is immediately seen that the tax is placed only on gasoline "sold or used in this State or purchased for sale or use in this State", that is, "on all motor fuel purchased in other states *and used in this State*" • • • where such tax is not a burden on such interstate • • • commerce". That is "*the State tax thereon*" referred to in Act 67. To construe Act 67 as levying a tax would render the Act unconstitutional.

> "Every law imposing a tax shall state distinctly the object of the same."
> Art. XVI. Sec. 11.

The Arkansas Supreme Court recognized Act 11 as so limited. In *Sparling* v. *Refunding Board*, so earnestly relied upon by appellant, that Court, after characterizing the tax as "a privilege tax for the use of the highways" says:

> "The legislature has declared the public policy of the State to be to tax all gasoline *sold or used in this State for that purpose.*" The words emphasized would not have been used except to qualify the words 'all gasoline.'"

The Arkansas Court then never intimated anywhere that it was the public policy of the State to tax gasoline neither sold or used in the State. The contrary is necessarily implied.

Where the language of a statute is unambiguous, the courts will give it its plain meaning. Construction is allowed only where there is ambiguity.

*Crooks* v. *Harelson*, 282 U. S. 55.

*Armstrong Paint & Vanish Co.* v. *Nu Enamel*, 305 U. S. 315.

Appellant's reference to Act 63 of 1931 does not aid him. He does not contend that that Act is not superseded by Act 67 of 1933, nor is he claiming any tax levied under the earlier Act. The earlier Act itself shows that it was a tax levied *for use in the State* and not applicable to gasoline not used in the State. Its purpose is declared to be

> "to impose a tax upon owners" * * * "*using*" gasoline * * *" upon the public roads and highways * * * of six cents per gallon * * * used."

The highways referred to are of necessity those of the State levying the tax, and therefore the tax was intended to reach only gasoline used in Arkansas, and not that passing through. No effort was made to collect any tax from appellee under the 1931 Act. This gasoline tax statute was amended by Act 11 of 1934 and the threats of collection first made under this Act.

We agree with the cases of *Baltimore National Bank* v. *State Tax Commissioner*, and *Chamberlain* v. *State*, cited by appellant, but must strenuously differ with him on this application.

If the Act specifically exempting the manufacturer of wine from the license is not broadened or repealed by the general affirmative statute imposing a tax on each vendor of intoxicating liquor, then certainly the Act specifically exempting gasoline not bought or used in the State is not broadened or repealed by a general affirmative statute imposing a fine unless that tax is paid.

Counsel's wish is father to his very illogical thought.

## Conclusion

All of the foregoing is purely in rebuttal to the contentions made in this Court for the first time and set out in

Sec. III, p. 6 to 14 of the appellant's reply brief. It is not in anywise intended as foregoing the contentions made in our first brief.

The fact that the Circuit Court of Appeals did not find it necessary to construe the Arkansas statute does not concern us. The appeal is from the action of that court, not from its reasoning; and if the result reached is correct it will not be reversed because not put upon the right ground.

*Frey & Sons, Inc. v. Cudahy Packing Co.*, 256 U. S. 208, 41 S. Ct. 451; 5 C. J. S. (Appeal in Error) 1813.

The Circuit Court of Appeals did reach the correct conclusion and its decree should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939

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Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas ..... *Appellant,*

v. No. 138

Dixie Greyhound Lines, Inc. ..... *Appellee.*

---

## APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## APPELLANT'S PETITION FOR REHEARING

---

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DEMOCRAT P. & L. CO., LITTLE ROCK

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Mississippi—1936 Laws, Chap. 162, Sec. 31 ..... 5

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---

## APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## APPELLANT'S PETITION FOR REHEARING

---

Appellant respectfully petitions the Court for a rehearing.

Appellant will not here reargue any point which is discussed in the prevailing or dissenting opinions. Appellant desires only to present and re-emphasize here a contention which was argued in his first brief, but which was not mentioned in the opinions. This point is important of itself, but its importance is much enlarged, and is made deserving of reconsideration, by reason of what was said in the prevailing opinions.

This point, briefly stated is, that Act 67 of 1933, can be sustained, independently of other reasons, as an aid to the enforcement of the gasoline tax laws of the state. It is stated in point II-C in the subject index to appellant's first brief and in the summary of argument on page 13. It is argued in pages 28-30; and decisions of this Court which have sustained state laws, or applications of state laws to specific situations, by invoking that principle, are cited there and in the footnote to page 17. Some of those state laws forbade or directly burdened interstate or foreign commerce, *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 40; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, 426; *New Mexico ex rel. McLean* v. *D. & R. G. Ry. Co.*, 203 U. S. 38.

It is to be noted that the title to Act 67 of 1933, is:

> "*An Act to Better Enforce the Gasoline Tax, and for Other Purposes.*" (Emphasis supplied.) (Appellant's first brief, p. 4.)

As is pointed out in appellant's first brief, pages 16, 17, 19, and in the opinion of the Supreme Court of Arkansas, in *Sparling* v. *Refunding Board*, 189 Ark. 189, 71 S. W. (2d) 182, successive acts of the Legislature of Arkansas have been directed to better enforcement of the gasoline tax, which is pledged to the payment of outstanding highway construction bonds.

The principle for which appellant here contends was approved in 24 Iowa Law Review 796, 797, May, 1939, in a review of the opinion of the Circuit Court of Appeals in this case, 101 F. (2d) 572, in which it was said:

> "Even though the state might not have power, separately considered, to measure a privilege by this

gasoline brought into the state but not consumed there, it might have power under the 'penumbra' theory if it were incidental to and necessary for the enforcement of other admittedly constitutional powers. Cf. *Silz* v. *Hesterberg*, 211 U. S. 31 (1908); *Purity Extract* v. *Lynch*, 226 U. S. 192 (1912); *Eichholz* v. *Missouri*, 306 U. S. 268, 59 Sup. Ct. 532 (U. S. 1939). It would seem necessary to use the measure here held unconstitutional in order that the state may have a practicable means of charging-out-of-state motorists for using the highways on the basis of gasoline to be used in the state, and in order to prevent gasoline bootlegging or other tax avoidance. *Otherwise the highway compensation tax system would be jeopardized.*" (Emphasis supplied.)

In an article entitled "State Taxation of Interstate Motor Carriers" in 32 Michigan Law Review 1, November, 1933, in commenting upon recently enacted statutes like Act 67 it was said (p. 35, footnote):

> "It is believed, however, that since the ordinary private passenger car is not affected by these requirements, *and since these regulations are deemed essential in order to enforce legitimate revenue measures*, the Supreme Court will declare such practices to be neither an unreasonable burden on interstate commerce nor a violation of the 'tolls' provision of the Federal Aid highway legislation." (Emphasis supplied.)

The tremendous practical difficulty entailed by the Court's decision is emphasized in the editorial entitled "The Arkansas Case" in TRANSPORT TOPICS of February 19, 1940, that being the official publication of American Trucking Associations, Inc., 1013—16th Street, N. W., Washington, D. C., in which it is said:

"Moreover, the decision, by declaring that a state may not levy a tax on gasoline that is to be used in

another state, implies that a state may, if it desires, tax all the gasoline that is to be used within its borders. No state has adopted this procedure yet, but some of those whose laws dealing with excess gas are invalidated by the Arkansas decision, might decide to adopt it as a means of regaining revenue. Theoretically, every gallon of gasoline bought in one state and used in another could be subjected to duplicate taxation. If the states should resort to this procedure motor carriers would have to pay double taxes on their fuel or buy just enough gasoline at each state line to carry the vehicle across the state.

"*Obviously, if such procedure became widespread, the burden upon motor carriers would be much greater than that imposed by the Arkansas law.*" (Emphasis supplied.)

That passage from the editorial emphasizes (1) the fairness and propriety of the twenty gallons exemption as a means of relieving gasoline purchased in other states from the Arkansas tax, (2) the practical and administrative difficulties that will be encountered by both the states and the motor carriers under this decision, and (3) the necessity of Act 67 as an aid to the enforcement of the state's gasoline tax laws.

The necessity for statutes like Arkansas' has been recognized in at least fourteen other states. In the following states there are statutes identical in purpose and effect with that of Arkansas, requiring the tax on all gasoline brought into the state in the fuel tanks of motor vehicles in excess of a certain amount. The amounts exempted are shown in parenthesis.

That other states have found legislation like that in issue here to be necessary as an aid to the enforcement of

their gasoline tax laws favors the validity of the Arkansas laws. *Purity Extract & Tonic Co.* v. *Lynch, supra* (226 U. S. p. 204); *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157.

Colorado—1935 Statutes Annotated, Vol. 2, Chap. 16, Sec. 382 (b). (10 gals.).

Idaho—1933 Session Laws, Chap. 46, Sec. 17. (20 gals.).

Illinois—1939 Rev. Stat., Bar Assn. Ed., Chap. 120, Sec. 417. (20 gals.).

Indiana—Acts of 1935, p. 453. (15 gals.).

Iowa—Code of 1935, Sec. 5093-f 2. (50 gals.).

Kansas—1939 Laws, Chap. 226. (20 gals.).

Mississippi—1936 Laws, Chap. 162, Sec. 31. (20 gals.).

Nebraska—Compiled Statutes, 1939 Supplement, Sections 66-426 and 66-427. (20 gals.).

Nevada—1935 Statutes, Chap. 74, Sec. 2. (25 gals.).

New Jersey—1935 Laws, Chap. 319, Sec. 606, p. 1026. (30 gals.).

New Mexico—1937 Session Laws, Chap. 83, Sec. 2. (25 gals.). This was passed to overcome the objection pointed out in *Bingaman* v. *Golden Eagle Western Lines,* 297 U. S. 626. Recites it is a "toll for the use of the highways."

Tennessee—1939 Public Acts, Chap. 81. (18 gals.).

Washington—1939 Session Laws, Chap. 177, Sec. 17. (20 gals.).

Wyoming—1935 Session Laws, Chap. 72, Sec. 14. (20 gals.).

The following decisions of this Court fully sustain appellant's contention.

In *New York ex rel. Silz* v. *Hesterberg, supra* (211 U. S. 31), there was involved a New York statute which forbade possession of certain species of game birds during the closed season in New York, whether killed within that state or elsewhere. The defendant was convicted of possessing game birds killed in Russia during the open season there and imported lawfully to New York during the New York season, but retained by the defendant during the closed season in New York. It was admitted that the imported birds were easily distinguishable at all times from any game birds native to New York. This Court nevertheless sustained the New York statute as applied to the facts of that case on the principle, applicable here, that it was a valuable aid to the enforcement of the game laws of the state. This Court said (p. 40):

> "The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game in the interest of the food supply of the people of the state."

In *New Mexico ex rel. McLean* v. *D. & R. G. R. Co., supra* (203 U. S. 38), a New Mexico statute was considered which required inspection of all hides being transported out of the state and charged an inspection fee therefor, but did not impose such demands upon hides remaining in the state. Against the claim that the Act discriminated against and burdened interstate commerce, this Court pointed out that the purpose of the law was to combat the stealing of cattle by positively insuring an inspection of brands on hides being shipped out of the state. The Court said (p. 54):

> "But legislation is not void because it meets the exigencies of a particular situation."

In *Bayside Fish Flour Co.* v. *Gentry, supra* (297 U. S. 422), a California statute required licenses of firms processing fish and laid certain stringent requirements, alleged to be discriminatory, upon those using fish for other purposes than human food. The law was sustained under the familiar principle of the state's power to conserve fish and game within its borders. However, the complainant alleged that as applied to him the Act could not be sustained upon that ground, and that it violated the Commerce Clause, because his fish were caught upon the high seas beyond the three-mile limit. This Court said (p. 426):

> "Sardines taken from waters within the jurisdiction of the state and those from without are, of course, indistinguishable; and to the extent that the Act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz* v. *Hesterberg*, 211 U. S. 31."

(427-428):

> "These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state—and we cannot invalidate them because * * * it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances."

This principle is stated in *Burnet* v. *Wells*, 289 U. S. 670, 678 (which involved an Act of Congress) as follows:

"Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits."

Also in *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201:

"It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

Also in *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388:

"The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity."

Analogous in principle is *Madden* v. *Kentucky*, No. 92, decided January 29, 1940, 84 L. Ed. (adv.) 406, where it is said:

"The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection."

That the Arkansas statute is a necessary aid to the enforcement of the gasoline tax laws of the state is evidenced not only by its title and the legislative history of gasoline taxation in Arkansas, but by a consideration of the record in this case. If all bus and truck companies start following the plan of appellee the collection of the states' gasoline taxes will be seriously affected. The only alternative to complete loss is to devise some plan whereby trucks

and buses can be charged the tax upon the amount of gasoline they actually use in the state. In the case of a few regular-route operators, it may be possible to follow such a plan, but the vast majority of operators do not follow regular routes and have no fixed or regular points of entry to or departure from the state. See Ex Parte No. MC-10, 2 Int. Com. Comm. Rpts., Motor Carrier Cases 703; Ex Parte No. MC-12, 1 id. 628.

Act 67 can easily be and should be sustained upon the principles of the cases above cited. The Court's decision, it is submitted, overlooks the practical necessities of at least fifteen states in the enforcement of gasoline tax laws and the practical needs of motor carriers.

In general, the states follow two different plans for the collection of motor vehicle taxes for the construction and maintenance of highways which those vehicles use. One plan requires high annual lump sum license fees and a low gasoline tax, and the other low annual license fees and a high gasoline tax. This latter plan has been much praised as tending to collect from interstate motor carriers taxes based proportionately upon their use of the states' highways. The gasoline tax has many times been stated to be an equitable tax as a measure of a carrier's use of the highways. The Court's decision defeats those meritorious features of the gasoline tax and will now require the states to revise their laws to require either high annual lump sum license fees of interstate motor carriers or enter upon a difficult and expensive attempt to collect the gasoline tax upon gasoline used in the state.

It is respectfully submitted that the Court should grant a rehearing of this cause and should sustain the Arkansas statute.

Respectfully submitted,

FRANK PACE, JR.,
Attorney for State Revenue Department,
State Capitol,
Little Rock, Arkansas.

AMOS M. MATHEWS,
204 South Canal Street,
Chicago, Illinois.
*Counsel for Appellant.*

## CERTIFICATE OF COUNSEL

The undersigned, counsel for appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FRANK PACE, JR.,

AMOS M. MATHEWS.

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1939

**No. 138**

Z. M. McCARROLL, Commissioner of Revenues of the State of Arkansas,
*Appellant,*
vs.
DIXIE GREYHOUND LINES, INC.,
*Appellee.*

## BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEVADA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING IN THE SUPREME COURT OF THE UNITED STATES.

GRAY MASHBURN,
*Attorney-General of the State of Nevada,*
W. T. MATHEWS,
*Deputy Attorney-General of the State of Nevada,*
ALAN BIBLE,
*Deputy Attorney-General of the State of Nevada,*
*Amici Curiae.*

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# In the Supreme Court

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## No. 138

Z. M. MCCARROLL, Commissioner of Revenues of the State of Arkansas,
*Appellant,*

vs.

DIXIE GREYHOUND LINES, INC.,
*Appellee.*

## BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEVADA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING IN THE SUPREME COURT OF THE UNITED STATES.

This brief is submitted by the Attorney-General of Nevada as amicus curiae in support of appellant's petition for a rehearing of the case by this Honorable Court. The Attorney-General of Nevada on behalf of such State respectfully joins with the appellant and the State of Arkansas in asking that the petition for rehearing be

granted. The State of Nevada, of course, has no interest in the controversy as between the parties, but has a vital interest in the legal principles which are involved.

The case before the Court involves the application of the Arkansas Gasoline Tax Law to passenger busses engaged in interstate commerce over and along the public highways into and out of the State of Arkansas. It appears that under the Arkansas statute a gasoline tax of six and one-half cents per gallon must be paid by each said bus on every gallon of gasoline contained in the gasoline tank thereof, over and above twenty gallons, as a condition precedent to entry into Arkansas as payment for the use of the highway within that State.

Nevada has a law providing an excise tax on the distribution of motor vehicle fuel, including gasoline, used to propel motor vehicles on the highways of the State, the same being Chapter 74, Statutes of Nevada 1935. Section 2 of such statute is very similar to the Arkansas statute under consideration in this case, and as applicable law herein, we quote:

> SEC. 2. In addition to any other taxes provided for by law, every dealer shall, not later than the twenty-fifth day of each calendar month, render to the tax commission a statement of all motor vehicle fuel sold, distributed or used by him in the State of Nevada during the preceding calendar month, and shall pay an excise tax of four cents per gallon on all motor vehicle fuel so sold, distributed or used, in the manner and within the time hereinafter prescribed; *provided, however*, that from the tax found to be due upon any such statement duly and punctually rendered the dealer shall be allowed to deduct two percent thereof to cover the dealer's cost of collection of the tax

and of compliance with this act and the dealer's handling losses occasioned by evaporation, spillage or other similar causes.

Every person who shall use any inflammable or combustible liquid or other material other than motor vehicle fuel as herein defined to operate a motor vehicle on the highways of this state shall pay an excise tax of four cents for each gallon thereof so used, and shall render monthly statements and make monthly payments at the times and in the manner prescribed for dealers in this act, and such users shall be similarly allowed to deduct two percent of the tax found to be due upon any statement duly and punctually rendered as aforesaid.

Any owner or operator of a motor vehicle who shall import motor vehicle fuel or other fuel or material into this state in the fuel tank or tanks of any such motor vehicle in a quantity exceeding twenty-five (25) gallons in the fuel tank or tanks thereof, shall, upon demand of the tax commission or its duly authorized agent, pay to said tax commission on such excess motor vehicle fuel the excise tax required to be paid by dealers.

Nothing in this act shall be construed to require more than one payment of any excise tax upon, or in respect to, the same fuel.

Section 3 of the Nevada statute provides for the disposition and use of the excise tax in the following language:

The excise tax herein prescribed shall be paid on or before the twenty-fifth day of each calendar month to the state treasurer, who shall receipt the dealer therefor. The money

so collected by the state treasurer shall be by him placed to the credit of the Nevada state highway fund; * * *.

The term "dealer" as defined in the Nevada statute includes "every person * * * who shall use the motor vehicle fuel in this state after having imported the same * * * ." Sec. 1(d).

Nevada has and maintains many miles of State highways known as Federal Aid highways, constructed and maintained by the State as aided by funds of the Federal Government pursuant to the provisions of the Federal Highway Act, the same being Sections 1–56, both inclusive, of Title 23, United States Code Annotated. Pursuant to Section 15 of the Federal Act it is incumbent upon the State to maintain such highways and pay the cost thereof. Use of such highways, particularly by those engaged in the transportation of persons and property for profit, should be paid for by those engaged in such transportation. A fair measure of such use, as has been demonstrated in many cases, is the mileage measure, which as computed by gallons of motor vehicle fuel used, in our opinion provides an equitable tax for such use.

A motor bus or motor truck operator, under the majority decision, it seems to us, may so equip his vehicle with a fuel tank of sufficient capacity as to preclude the necessity of refueling in a State, even though the mileage operated may be many times more than the mileage operated in Arkansas in the instant case. Such a situation can and will arise in Nevada on U. S.-Nevada Highway No. 466, which said highway extends from Los Angeles, California, northerly into and across Nevada, thence through a portion of Arizona, and on into Utah. The Nevada portion of this highway is 72 miles in length. It carries heavy interstate traffic by

means of bus and truck transportation. It is obvious that the decision of the Court herein will materially affect the enforcement of the Nevada law.

The principle involved in the decision is important to every State confronted with the task and the financial burden of maintaining highways burdened with interstate as well as intrastate traffic. We respectfully submit that the vital interest of the State of Nevada in the revenue necessary for the maintenance of its State highways is most seriously threatened by the decision heretofore made in this case, and by reason thereof we respectfully request this Honorable Court to grant a rehearing of this important matter.

Dated, Carson City, Nevada, March 1, 1940.

GRAY MASHBURN,
*Attorney-General of the State of Nevada,*
W. T. MATHEWS,
*Deputy Attorney-General of the State of Nevada,*
ALAN BIBLE,
*Deputy Attorney-General of the State of Nevada,*
*Amici Curiae.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1939**

# No. 138

M. McCARROLL, Commissioner of Revenues of the State of Arkansas,

*Appellant,*

*vs.*

DIXIE GREYHOUND LINES, INC.,

*Appellee.*

PEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## RIEF AMICUS CURIAE OF THE STATE OF NEW HAMPSHIRE.

THOMAS P. CHENEY,
*Attorney General of New Hampshire,*
*Concord, New Hampshire.*

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1939

## No. 138

Z. M. McCARROLL, Commissioner of Revenues of the State of Arkansas,

*Appellant,*

*vs.*

DIXIE GREYHOUND LINES, INC.,

*Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF AMICUS CURIAE OF THE STATE OF NEW HAMPSHIRE.

The State of New Hampshire, by Thomas P. Cheney, Attorney General of New Hampshire, respectfully presents this brief amicus curiae and requests that it be filed.

This State has a statute the enforcement of which is affected adversely by the decision of this Court in the above entitled cause filed February 12, 1940. Such statute has been found to be highly necessary in the enforcement of the gasoline tax laws of this State.

Chapter 104, Public Laws of New Hampshire of 1926, provides for the collection of a gasoline tax, now four cents per gallon, which is expressly denominated a "road toll", that is, a tax for the privilege of using the highways. The tax is used exclusively for construction and maintenance of highways.

In 1933 the following statute (now in effect) was enacted amending said Chapter 104 (New Hampshire Laws of 1933, Chap. 144, p. 200):

"AN ACT RELATING TO THE TRANSPORTATION OF FUELS IN MOTOR TRUCKS.

"Section 1. Auxiliary Tanks on Trucks.

"Section 2. Takes Effect.

"Be it enacted by the Senate and House of Representatives in General Court convened:

"1. Trucks. Amend Chapter 104 of the Public laws by adding after Section 7, the following new section:

7-a. Auxiliary Tanks. No commercial motor vehicle or truck, except such vehicles or trucks owned or operated by distributors duly licensed under the provisions of Section 1, of this Chapter, or by persons regularly engaged in the transportation of petroleum products for hire, shall be operated upon the highways of this state equipped with or containing any fuel tank other than the ordinary standardized equipment fuel tank attached to and forming a part of said motor vehicle as furnished by the manufacturer of said motor vehicle. Whoever violates any of the provisions of this section shall be fined not more than one hundred dollars.

"2. Takes Effect. This act shall take effect July 1, 1933.

"Approved June 2, 1933."

While this statute is not precisely like the Arkansas law, it is similar in principle in that it was designed to prevent evasion. If a motor vehicle operator can carry any quantity of gasoline into Arkansas in his fuel tanks tax free by claiming he is taking it through the State for use in other States, he will now contend that there can be no limitation on the number or size of his fuel tanks to carry such fuel. In other words, he will say that the State can impose no limitation upon the potentialities of tax evasion.

When a motor vehicle operator brings a large amount of gasoline into the State it is impossible to tell whether he intends to use it in the State or carry it through the State. *The tax evader will seize upon the court's decision in this case and claim that he is carrying most of it through the State for use in other States.* And we desire to bring strongly to the Court's attention the related facts (1) that the gasoline tax evader is a most serious problem to the States; and (2) that the New Hampshire and Arkansas acts and similar laws in other States were enacted to prevent a major practice of evasion, thereby stopping not only that particular leak but strengthening the entire enforcement of the gasoline tax laws.

In *Motor Fuel Taxation in the United States*, 1939, by F. G. Crawford, it is pointed out (pp. 108-111) that gasoline tax evasion has become a serious menace to the States, and (p. 109) that one of the means of evasion is the carrying of large or excess quantities of gasoline in motor vehicles from one State to another.

It is submitted that the court should sustain the Arkansas statute on the ground outlined above. There are numerous decisions which, we believe, not only justify but require such a decision. See *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 40; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151, and cases there cited.

Wherefore, the State of New Hampshire respectfully suggests that the Court should grant a rehearing of this cause and should sustain Act 67 of 1933 of the State of Arkansas.

Respectfully submitted,

THOMAS P. CHENEY,
*Attorney General of New Hampshire,*
*Concord, New Hampshire.*

**Certificate.**

I hereby certify that the foregoing brief amicus curiae is presented in good faith and not for delay.

THOMAS P. CHENEY,
*Attorney General of New Hampshire.*

# SUPREME COURT OF THE UNITED STATES.

No. 138.—October Term, 1939.

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, Appellant,
*vs.*
Dixie Greyhound Lines, Inc.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 12, 1940.]

Mr. Justice McReynolds delivered the opinion of the Court.

An Arkansas statute[1] prohibits entry into the State of any automobile or truck "carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used as motor fuel in said truck or motor vehicles until the state tax thereon [six and one-half cents per gallon[2]] has been paid."

Appellee, a Delaware corporation, operates passenger busses propelled by gasoline motors, from Memphis, Tennessee across Arkansas to St. Louis, Missouri, and in reverse. The route between these

1 Act 67 General Assembly Arkansas, approved March 2, 1933—

Section 1. On and after the passage of this Act it shall be a violation of the law for any person, co-partnership or company to drive or cause to be driven into the State of Arkansas any automobile or truck carrying over twenty (20) gallons of gasoline in the gasoline tank of such automobile or truck or in auxiliary tanks of said trucks to be used as motor fuel in said truck or motor vehicles until the state tax thereon has been paid.

Section 2. Any person, co-partnership or company violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred ($100) dollars. Each load carried into the state shall constitute a separate offense.

Section 3. All laws and parts of laws in conflict herewith are hereby repealed. It is ascertained that this Act is necessary to better enforce the gasoline collection laws and said Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage.

2 Act 11 Extraordinary Sessions Arkansas, approved February 12, 1934—

Section 22. Paragraph (c) of Section 1 of Act No. 63 of the General Assembly, approved February 25, 1931, is amended to read as follows:

"(c) There is hereby levied a privilege or excise tax of six and one-half cents on each gallon of motor vehicle fuel as defined in this Act, sold or used in this State or purchased for sale or use in this State."

points approximates 342 miles—3 in Tennessee, 78 in Arkansas, 261 in Missouri. Like busses ply between Memphis and points within and beyond Arkansas, and in reverse. It is only necessary now to consider the facts connected with operation of the Memphis-St. Louis line. They are typical.

Each bus consumes about one gallon of gasoline for every five miles traversed. Sixty-eight gallons are required for the journey from Memphis to St. Louis—under one in Tennessee, sixteen in Arkansas, fifty-one in Missouri. The practice is to place in the bus tank at Memphis the sixty-eight gallons of gasoline commonly required for the trip; also ten more to meet any emergency. Thus upon arrival at the Arkansas line the tank contains some seventy-seven gallons of which sixteen probably will be consumed within that State. As a condition precedent to entry there, appellant—revenue officer of the State—demands that each bus pay six and one-half cents upon every gallon of this gasoline above twenty, and threatens enforcement.

By a bill in the District Court, appellee unsuccessfully sought an injunction against this threatened action. The Circuit Court of Appeals Eighth Circuit took a different view.

After accepting as correct the ruling in *Sparling* v. *Refunding Board*, 189 Ark. 189, 199, 71 S. W. (2d) 182, 186, that the tax imposed was not upon property but on the privilege of using the highways, and had been definitely allocated to highway purposes, the latter court said—

"The appellant does not now contend that the tax of which it complains may not be imposed by the State of Arkansas with respect to gasoline consumed or to be consumed upon the highways of Arkansas, as compensation for the use of the highways, but it does contend that that State may not impose a tax upon gasoline which is carried in interstate commerce for use in Missouri or Tennessee, because that would constitute a direct and unreasonable burden upon interstate commerce."

"Reduced to its lowest possible terms, the question for decision, we think, is whether the imposition of the tax upon gasoline carried, for use in other states, in the fuel tank of a motor vehicle traveling in interstate commerce can be sustained. That the tax is a direct burden on interstate commerce, cannot be controverted."

"If it is to be sustained at all with respect to gasoline to be used in other states, it must be sustained upon the theory that the method employed for determining the amount of the tax constitutes a fair measure for ascertaining the compensation which lawfully

may be exacted by Arkansas from the appellant for the use which it makes of the highways of the State."

"While we can understand how the use of state highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one state can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another state."

Also, it declared the point in issue is ruled by *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186, which held invalid a tax laid by Tennessee's Legislature on the privilege of operating a bus in interstate commerce because not imposed solely as compensation for the use of highways or to defray the expense of regulating motor traffic.

Finally, it reversed the District Court and directed entry of a decree there enjoining appellant "from enforcing the challenged tax against it [the appellee] with respect to all gasoline in the fuel tanks of its interstate busses which is being carried through Arkansas for use in other states."

This action we approve.

The often announced rule is that while generally a state may not directly burden interstate commerce by taxation she may require all who use her roads to make reasonable compensation therefor. *Hendrick* v. *Maryland*, 235 U. S. 610, 622; *Interstate Transit, Inc.* v. *Lindsey, supra*, 185, 186; *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, 628.

Here, the revenue officer demanded payment of appellee on account of gasoline to be immediately transported over the roads of Arkansas for consumption beyond. If, considering all the circumstances, this imposition reasonably can be regarded as proper compensation for using the roads it is permissible. But the facts disclosed are incompatible with that view. A fair charge could have no reasonable relation to such gasoline. That could not be even roughly computed by considering only the contents of the tank. Moreover, we find no purpose to exact fair compensation only from all who make use of the highways. Twenty gallons of gasoline ordinarily will propel a bus across the State and if only that much is in the tank at the border no charge whatever is made. Evidently large use without compensation is permissible and easy to obtain.

The point here involved has been much discussed. Our opinions above referred to and others there cited define the applicable principles. The present controversy is within those approved by *Interstate Transit, Inc.* v. *Lindsey, supra.* Neither *Hicklin* v. *Coney,* 290 U. S. 169, nor *Bingaman* v. *Golden Eagle Western Lines, supra,* relied upon by appellant's counsel, properly understood, sanctions a different view.

The challenged judgment must be affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 138.—October Term, 1939.

Z. M. McCarroll, Commissioner of Revenue of the State of Arkansas, Appellant,
*vs.*
Dixie Greyhound Lines, Inc.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 12, 1940.]

Mr. Justice Stone, concurring.

The Chief Justice, Mr. Justice Roberts, Mr. Justice Reed and I agree with Mr. Justice McReynolds, but we think a word should be said of appellant's contention that the tax in its practical operation may be taken as a fair measure of respondent's use of the highways.

Since the subject taxed, gasoline introduced into the state in the tank of a vehicle, for use solely in propelling it in interstate commerce, is immune from state taxation except for a limited state purpose, the exaction of a reasonable charge for the use of its highways, it is not enough that the tax when collected is expended upon the state's highways. It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made. *Sprout* v. *City of South Bend*, 277 U. S. 163, 170; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186; *Bingaman* v. *Golden Eagle Western Lines*, 297 U. S. 626, 628; *Morf* v. *Bingaman*, 298 U. S. 407; *Ingels* v. *Morf*, 300 U. S. 290, 294.

While the present tax, laid on gasoline in the tank in excess of twenty gallons, admittedly has no necessary or apparent relationship to any use of the highways intrastate, appellant argues that, as applied to the reserve gasoline in each of appellee's vehicles, the tax either is, or with a reduction of the reserves would be, substantially equivalent to a tax which the state could lay, but has not, on the gasoline consumed within the state. That could be true only in case the taxed gasoline, said to be reserved for the extrastate

journey, were by chance or design of substantially the same amount as that consumed intrastate.

That the relationship between tax and highway use does not in fact exist as the business is now conducted, is demonstrated by appellant's showing that on all of appellee's routes, taken together, the taxed gasoline which is reserved for extrastate use is substantially more than that consumed on those routes within the state. In three the taxed reserve in excess of the twenty gallons exemption is substantially the same as the amount of the intrastate consumption. But on the fourth route the taxed reserve on busses moving in one direction is more than four times that consumed within the state. In the other it is approximately the same. With the three scheduled trips daily each way on the Memphis-St. Louis route, the excess of the gasoline taxed over that consumed in the state is more than 150 gallons per day. In no case does it appear that the amount of taxed gasoline has any relation to the size or weight of vehicles.

It cannot be said that such a tax whose equivalence to a fair charge for the use of the highways, when not fortuitous, is attained only by appellee's abandonment of some of the commerce which is taxed, has any such fair relationship to the use of the highways by appellee as would serve to relieve the state from the constitutional prohibition against the taxation of property moving in interstate commerce. A tax so variable in its revenue production when compared with the taxpayer's intrastate movement cannot be thought to be "levied only as compensation for the use of the highways". *Interstate Transit, Inc.* v. *Lindsey, supra,* 186. Justification of the tax, as a compensation measure, by treating it as the equivalent of one which could be laid on gasoline consumed within the state must fail because the statute on its face and in its application discriminates against the commerce by measuring the tax by the consumption of gasoline moving and used in interstate commerce which occurs outside the state. See *Fargo* v. *Michigan,* 121 U. S. 230, 241; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 438.

It is no answer to the challenge to the levy to say that by altering the amount of the gasoline brought into the state for extrastate consumption appellee could so moderate the tax that it would bear a

fair relation to the use of the highways within the state. In the circumstances of this case the state is without power to regulate the amount of gasoline carried interstate in appellee's tanks. It cannot be said, if that were material, that the amount carried is not appropriate for the interstate commerce in which appellee is engaged and it can hardly be supposed that the state could compel appellee to purchase there all the gasoline which it uses intrastate upon an interstate journey, because that would be a convenient means of laying and collecting a tax for the use of the highways. There are ways enough in which the state can take its lawful toll without any suppression of the commerce which it taxes. In laying an exaction as a means of collecting compensation for the use of its highways the state must tax the commerce as it is done, and not as it might be done if the state could control it. Appellant cannot justify an unlawful exaction by insisting that it would be lawful if the taxpayer were to relinquish some of the commerce which the Constitution protects from state interference.

# SUPREME COURT OF THE UNITED STATES.

No. 138.—October Term, 1939.

Z. M. McCarroll, Commissioner of Revenues of the State of Arkansas, Appellant, *vs.* Dixie Greyhound Lines, Inc. } Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[February 12, 1940.]

Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Douglas, dissenting.

We take a different view. Measured by the oft-repeated judicial rule that every enactment of a legislature carries a presumption of constitutional validity, the Arkansas tax has not, in our opinion, been shown to be beyond all reasonable doubt in violation of the constitutional provision that "Congress shall have power to . . . regulate commerce . . . among the States." "In case of real doubt, a law must be sustained." Mr. Justice Holmes in *Interstate Ry. Co.* v. *Mass.*, 207 U. S. 79, 88.[1] Congress, sole constitutional legislative repository of power over that commerce, has enacted no regulation prohibiting Arkansas from levying a tax—on gasoline in excess of twenty gallons brought into the State—in return for the use of its highways. Gasoline taxes are widely utilized for building and maintaining public roads, and the proceeds of this Arkansas tax are pledged to that end. Arkansas can levy a gallonage tax on any gasoline withdrawn from storage within the State and placed in the tanks of this carrier's vehicles "notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce." *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249, 252. The present tax aims at carriers who would escape such taxation, unless we are to require Arkansas to shape its taxes to the circumstances of each carrier.

The cost entailed by the construction and maintenance of modern highways creates for the forty-eight States one of their largest financial problems. A major phase of this problem is the proper

[1] Cf. Ogden v. Saunders, 12 Wheat. 213, 270; Butler v. Penn., 10 How. 402; Booth v. Illinois, 184 U. S. 425; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 606, 615; S. C. Highway Dept. v. Barnwell Bros., 303 U. S. 177, 195.

apportionment of the financial burden between those who use a State's highways for transportation within its borders and those who do so in the course of interstate transportation. Striking a fair balance involves incalculable variants and therefore is beset with perplexities. The making of these exacting adjustments is the business of legislation—that of state legislatures and of Congress. This Court has but a limited responsibility in that state legislation may here be challenged if it discriminates against interstate commerce or is hostile to the congressional grant of authority. *McGoldrick* v. *Berwind-White Coal Mining Company*, decided January 29, 1940.

Arkansas' tax hits the big, heavy busses and trucks which, it is well established, entail most serious wear and tear upon roads. Had Arkansas expressly declared the challenged statute to be a means of working out a fair charge upon these heavy vehicles for cost and maintenance of the roads they travel in the State, the relationship between the means employed and these allowable ends—however crude and awkward—would have been rendered more explicit, but not made more evidently a matter of policy and administration, and therefore not for judicial determination. Certainly, the State had power to impose flat fees or taxes graduated according to gasoline used, horsepower, weight and capacity or mileage, and yet those taxes would not measure with exact precision the taxpayers' use of Arkansas highways.[2] It is not for us to measure the refinements of fiscal duties which a State may exact from these heavy motor vehicles.[3]

This case again illustrates the wisdom of the Founders in placing interstate commerce under the protection of Congress. The present problem is not limited to Arkansas, but is of national moment. Maintenance of open channels of trade between the States was not only of paramount importance when our Constitution was framed; it remains today a complex problem calling for national vigilance and regulation.

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[2] Interstate Busses Corp. v. Blodgett, 276 U. S. 245; Carley & Hamilton v. Snook, 281 U. S. 66; Continental Baking Co. v. Woodring, 286 U. S. 352; Hicklin v. Coney, 290 U. S. 169; Aero Transit Co. v. Georgia Comm'n, 295 U. S. 285; Morf v. Bingaman, 298 U. S. 407.

[3] If the State had the power to levy the tax, absent congressional proscription, it likewise had the power to extend the grace of exemption to users of its highways of less tank capacity or gasoline load than appellee. Cf. Continental Baking Co. v. Woodring, *supra*, 370-3; Sproles v. Binford, 286 U. S. 374, 396; Aero Transit Co. v. Georgia Comm'n, *supra*, 289, 292-3.

Our disagreement with the opinions just announced does not arise from a belief that Federal action is unnecessary to bring about appropriate uniformity in regulations of interstate commerce. Indeed, state legislation recently before this Court indicates quite the contrary. For instance, we sustained the right of South Carolina—in the absence of congressional prohibition—to regulate the width and weight of interstate trucks using her highways, even though the unassailed findings showed that a substantial amount of interstate commerce would thereby be barred from the State. *S. C. Hwy. Dept.* v. *Barnwell Bros.*[4] We did not thereby approve the desirability of such state regulations. It is not for us to approve or disapprove. We did decide that "courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of national commerce."[5] As both the Union and the States are more and more dependent upon the exercise of their taxing powers for carrying on government, it becomes more and more important that potential conflicts between state and national powers should not be found where Congress has not found them, unless conflict is established by demonstrable concreteness. See *Hammond* v. *Schappi Bus Line*, 275 U. S. 164.

Even under the principle enunciated by the majority—that Arkansas may not measure her tax by gasoline carried in appellee's tanks for use in other States—the challenged judgment should not stand.

Arkansas admittedly has power to tax appellee upon gasoline used within her borders, and need not, of course, extend to appellee any exemption for a reserve. The record discloses that appellee's busses travel 1188.8 miles each day over Arkansas highways. The trial judge found, and there is evidence to support the finding, that these busses use about one gallon of gasoline for every five miles traveled. Thus, appellee uses about 237.76 gallons of gasoline a day in Arkansas, upon which the tax of 6.5 cents per gallon used would amount to $15.45 a day.

Appellee's busses travel four different routes, two from Memphis through Arkansas to Missouri, and two from Memphis to cities in Arkansas. On the trips to Missouri the tax now exacted by Ar-

[4] 303 U. S. 177, 190.
[5] *Id.*, 190.

kansas is greater than would be a tax on the gasoline actually used in Arkansas. But on the trips from Memphis into Arkansas and back, the tax exacted, because of the 20-gallon exemption, is less than would be a tax on the gasoline used in Arkansas.

As appellant points out in his brief, when all the routes are taken together, the daily tax which Arkansas would collect if appellee carried only enough gasoline to complete each trip would only amount to $13.00—actually $2.45 less than a tax on gasoline consumed in Arkansas.

This amount—$2.45—equals the present tax on 37 gallons of gasoline. Appellee's busses enter Arkansas 13 times each day. It follows that appellee may carry a reserve of almost three gallons on each trip and still pay no more than the tax which, as the majority assumes, Arkansas could constitutionally impose on the gasoline actually consumed on her own roads. There is nothing in the record to show that a greater reserve is necessary. An interstate carrier has no absolute right to fix the size and character of its equipment used in interstate commerce, in total disregard of the necessities of the enterprise and the requirements of States through which the carrier operates.[6] Exactions by such States may well be designed to operate upon the quantity of gasoline reserves for considerations analogous to those which have called into being state regulations of the size, weight and number of the vehicles themselves. And a state tax which may induce a reduction in the amount of reserve previously carried is no more to be condemned on that sole ground alone than is a state law actually prohibiting vehicles above a certain size or weight. That this reduction may be attributable to a tax rather than to a regulatory measure expressly passed in the interests of public safety should not be controlling. Particularly is this so when the proceeds of the tax are utilized exclusively for highway purposes and the tax itself is directed to gasoline used, just as other equipment is used, in the course of interstate business and involves no manifestation of hostility to—or levy upon—gasoline carried as a commodity in interstate commerce. It is presumably safe to rely on appellee's self-interest to work out any schedules of refueling at its various storage facilities necessitated by changes in reserves carried. We cannot believe that appellee is able to attack the constitutionality of this tax on the ground that as to others it

[6] S. C. Highway Dept. v. Barnwell Bros., 303 U. S. 177.

might operate differently and serve to burden the use of gasoline in other States.[7] It is important to bear in mind that we are not passing upon a statute as such but upon the incidence of this statute in the single concrete situation presented by a specific objector on this specific record. The very fact that such niceties of calculation have to be indulged in as the concurring opinion finds necessary in order to establish the mischief of the statute, makes manifest the "real doubt" of any showing of unconstitutionality and indicates that a burden of calculation and speculation is assumed in the exercise of the judicial function which should be left to the legislatures of the States and the Congress.

Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit and miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by "the narrow scope of judicial proceedings"[8] Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships. See, Comparative Charts of State Statutes illustrating Barriers to Trade between States, Works Progress Administration, May, 1939; Proceedings, The National Conference on Interstate Trade Barriers, The Council of State Governments, 1939. But the remedy, if any is called for, we think is within the ample reach of Congress.

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[7] Bourjois, Inc. *v.* Chapman, 301 U. S. 183, 190; Monamotor Oil Co. *v.* Johnson, 292 U. S. 86, 96; see opinion of Mr. Justice Brandeis, Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288, 347.

[8] See Mr. Chief Justice Taney, dissenting, Penn *v.* Wheeling, etc. Bridge Co., 13 How. 518, 592.